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# Supreme Court of the United States

OCTOBER TERM, 1955.

MARJORIE A. MULLINS,

*Petitioner,*

*against*

THE CLINCHFIELD COAL CORPORATION,

*Respondent.*

*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, FOR THE FOURTH CIRCUIT.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT and APPENDIX.

MARJORIE A. MULLINS,
*Petitioner,*
*Attorney Pro Se,*
15 Fourth Street,
Frenchtown, N. J.

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# Supreme Court of the United States

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**No.**

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MARJORIE A. MULLINS,

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*against*

THE CLINCHFIELD COAL CORPORATION,

Respondent.

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*ON APPEAL FROM THE UNITED STATES COURT OF APPEALS, FOR THE FOURTH CIRCUIT.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The petition prays that a writ of certiorari issue to review the predicament that this Petitioner is in due to the intentional and purposeful loss of her case by her counsel's cooperation with the defendants' counsel as well as to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit, dated and entered in this case on November 18, 1955.

### Opinion Below.

The Opinion of the United States Court of Appeals for the Fourth Circuit appears at pages 42-51 of the Appendix to this petition.

## Jurisdiction.

The judgment of the Court of Appeals was entered November 18, 1955 (App., p. 52).

Order Denying Petition for a rehearing was denied on January 4, 1956 (App., p. 53).

Order Extending Time to file Petition for Writ of Certiorari extended to May 3, 1956 (App., p. 54).

Jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254.

## Questions Presented.

1. Where the surface rights in the residuum are servient to extremely broad mineral rights and the surface owner has completely removed large quantities of valuable coal belonging to the mineral owner with the bona fide intention of reaching the strata below, in order to construct a large coal processing plant *solely* to benefit its adjoining coal properties *for it owns not one ton of coal in the tract in question,* are installations of this type and character illegal and does the general use of the surface in connection therewith constitute an unreasonable and unnecessary use of the servient estate causing a legal injury to the mineral owner since these activities pre-empt her dominent *right to mine* and prepare *all* her coal and also pre-empt her right to *occupy* the containing coal chamber, to which *she alone* holds title of occupancy thereby totally destroying her property right of alienation?

2. Where the surface owner has excavated the overburden and a portion of the coal seam with the bona fide intention of laying its mine tracks directly upon coal belonging to the mineral owner and is continuously transporting

coals mined from its adjoining coal properties over and upon and through the mineral owner's estate, is not the surface owner violating his surface rights and encroaching upon the mineral owner's estate with the bona fide intention of enriching himself therefrom without liability to the mineral owner?

3. Since the surface owner continued to remove additional coal belonging to mineral owner and continued to place still more extensive installations upon the surface during the pendency of this action without notifying the mineral owner or her attorneys, all for the sole benefit of coal mined from its adjoining coal properties as well as coal mined from properties belonging to others, does not the character of these actions constitute a willful and deliberate trespass and show an utter disregard for the rights of mineral owner thereby entitling her to pitmouth price for the coal destroyed and any further relief which The Supreme Court of United States may deem proper and necessary?

## Statement.

This Petitioner has been the unsuspecting victim of a fraudulent attempt *by her own attorneys* to coerce her, through the *intentional* loss of her law suit, into selling to the *Clinchfield Coal Corporation* her valuable surface easements adhering to her strong mineral deed, in order that it may convey these coveted rights to the Chesapeake & Ohio Railway Company. The railroad, in turn, would then be in a position to clear its obligations to the Commonwealth of Virginia and her State Corporation and State Highway Commissions. These surface rights are also drastically needed by both corporations in order to

free themselves from their joint liabilities to the mineral owner for their unlawful operations on her property.

Only after persistent and concentrated strenuous efforts to purchase these valuable rights for a pittance had failed, was her fourth law firm *permitted* to instigate an action, *supposedly* in her behalf. An action, purposely designed and master-minded by counsel for the defendants, looking toward the eventual loss of the case in Court. The strategy behind this was that in her moment of great despair, after ten years of tremendous and exhausting effort on her part to bring her controversy to trial, along with extreme legal and engineering expenses over the years, that she would give up and be forced to sell her rights, as well as her coal in situ, to Clinchfield and made to accept their inadequate offer. Their meager purchase price was based, in 1948, only upon their shrewd appraisal of her coal in situ with no regard for the intrinsic value of her surface rights. Since 1948, their offer has never fluctuated and no other basis of settlement has ever been seriously advanced. If their strategy worked, they hoped to exterminate the threat of a Mandatory Injunction against their continued trespasses and their worry of having a starving plant on their hands. They further hoped to inexpensively dispose of their liability to the mineral owner for the legal injuries which they had inflicted upon her.

Therefore, the petition for a Writ of Certiorari will include information and evidence related to this rare but truly terrible experience, as well as the legalities of the encroachment, in order that The Supreme Court of the United States can more readily determine whether to exercise its Power of Supervision.

Because this petitioner is physically very ill and under medical care and because she seriously doubts that she

will be available to write a brief in behalf of herself later on, she has endeavored to use this opportunity to show the complete record of her attorney's guilt and the oppressive and intolerable treatment she has been forced to endure in attempting to save her property. Therefore, her petition cannot be short or concise. Please notice the unsympathetic attitude of American Bar Association (App., pp. 135 to 144).

The Mineral Estate in the "Upper Bond Tract" which is the property involved in this action, is the Dominant Estate because the surface owner purchased its surface rights in the residuum subsequently and subject to the the mineral owner's very broad mining rights with strong surface easements adhering thereto (see respective deeds, App., pp. 55-61). The surface owner Clinchfield Coal Corporation was the first to exercise its rights in the residuum of Upper Bond. This action praying for a Mandatory Injunction was brought because the surface owner and its grantee, the Chesapeake & Ohio Railway Company, *owning not one ton of coal in the tract in question,* without the knowledge or permission of the mineral owner, removed approximately 29,000 tons of her coal at two locations in order to construct mine tracks against the slope and a coal preparation plant with standard gauge trackage in the bottom land *solely* to *transport to* and *process upon* and *ship from* the Upper Bond tract, 66,000,000 tons of coal mined from the surface owner's adjoining coal properties, thereby pre-empting the mineral owner's dominant right to locate her plant and side tracks in same central area on the choicest and the only naturally, practical location but more important, adjacent to the main line tracks of the Chesapeake & Ohio Railway Company.

Her property right of alienation was hereby totally destroyed, other than forcing her into a position of having to sell her rights to the single purchaser Clinchfield, at a price it elects to pay her for them or $12,390 based on price of her coal in situ with no regard for her more valuable surface rights adhering therefrom. Meanwhile, the surface owner and the railroad continue to benefit themselves unlawfully without liability to the mineral owner.

The following conservative statement paralleling Petitioner's situation appears exactly in 5 *Pomeroy's Equity Juris.* (2d Ed.), §503:

> "Assuming, then that the only question before the court is the propriety of balancing the injury that may be caused to the parties by the decree, and remembering that the question does not arise except when equity has jurisdiction of the case because the plaintiff's legal remedy is inadequate, it should be noted that to deny the injunction is (1) 'to allow the wrong-doers to compel innocent persons to sell their right at a valuation,' and (2) to refuse him altogether any equitable relief in a case where, on the ground of avoiding multiplicity of suits at least, he is clearly within one of the most frequently given reasons for assuming jurisdiction, and where, also, his injury may be irreparable. In view of this situation it is clear that the plaintiff's prayer will not readily be denied, and it can safely be said that the argument based on the balance of injury to the defendant will be availing only in a limited class of cases. * * *"

In addition, the surface owner laid its mine tracks on the slope directly upon the balance of her coal still in place and in the containing shell from which it had unlawfully removed her coal and in which it holds *no title* until the coal is completely mined out. The surface owner has continued to enrich itself therefrom without offering to com-

pensate the mineral owner for this unlawful use of her estate for *transportation purposes* since 1948.

Three separate times her coal has been removed and the space it occupied was appropriated for the surface owner's illegal needs. If the surface owner is allowed to continue, all the mineral owner's estate could be so absorbed and she would be left holding a deed to nothing while forced to pay mineral taxes to the State of Virginia. She is to-day paying mineral taxes on an estate she cannot sell or lease because no one will knowingly buy into a law suit.

The railroad has not been in a position to fulfill its commitments to the Commonwealth of Virginia agreed to by the railroad under the terms of several Highway Department Permits dated 1946 and 1947, necessitated by the *illegal* relocation of Virginia Secondary Road 632 under which the railroad, as *permittee,* agreed to deed to the Commonwealth of Virginia by *general warranty fee title,* this road's new location and for which the Commonwealth agreed to exchange its quitclaim deed by prescriptive title to the road's former location. Consequently, some nine parcels of land became contingent upon the railroad's adamant reluctance to properly acquire the property necessary for its right of way and the road change, by general warranty fee title on Upper Bond tract, as well as on the Lower Bond tract which this mineral owner also controls. These nine parcels are therefore unavailable to the Commonwealth of Virginia by this railroad's sinister and very irregular activities. The permits specified also that the permittee was to clear any opposition to the road change. The mineral owner opposed the road's relocation in 1948, with the Virginia Highway Commission as soon as she realized that it was not necessitated by the main line right of way construction but instead was the physical means of providing additional surface area for private industry's

load tracks for the shipping of coal mined from its adjoining coal properties.

To date the mineral owner has not received any voluntary compensation from the railroad for its *main line right of way through her property;* nor any offer of compensation from the surface owner for use of the mineral owner's *surface easements* which she refers to as her "plant site rights"; nor for *wheelage rights* for use of her mineral estate for transportation purposes; nor for *dumping privileges* for refuse *mined elsewhere* and *transported to* and *dumped upon* a large area of the surface of Upper Bond where the mineral owner's north coal bearing area is located and where she is *entitled* to broad uses of the natural surface; nor for *wheelage rights* necessitated by the public truck ramp installation.

The Court below affirmed the Trial Court's decision of awarding the mineral owner a Judgment in her favor of $1,363.50 for coal removed by the surface owner, based on 25¢ a ton on the *surface owner's* minimized tonnage figures of 5,454 tons as against the mineral owner's very conservative estimate of 29,000 tons because a pocket of seven foot thick coal had *literally vanished* and the surface owner's computation is conveniently based on the coal thickness of 44 inches presently showing in the facing.

This type of situation is discussed in 58 C. J. S. Mines and Minerals, §137, p. 234, where this is said:

> "* * * While the commission of the trespass by defendant must be proved by a preponderance of the evidence, evidence of defendant's knowledge that he was mining plaintiff's land, although circumstantial, may be convincing, and plaintiff is not precluded from recovering damages for the wrongful mining of coal because his evidence of the amount of coal mined

is merely an approximation, *where complete accuracy was made impossible by defendant's acts.*"

The Trial Court believed that the surface owner had acted in "good faith" and further believed that no legal injury had been done to the mineral owner. The Trial Court sustained the surface owner's belief that it was within its legal rights to use this surface and the coal chamber, which chamber the mineral owner contends she *alone* owns title to the right of occupancy of, in order that surface owner may benefit its vast mineral properties, as well as mineral properties belonging to others. The Defendants were practically awarded a *free ticket* to remain and they intend to interpret the Decision as such, as will be noted in Chesapeake and Ohio's Reply of April 11, 1956 to Petitioner's letter of April 4, 1956 asserting her rights (App., pp. 129-134).

However, the Courts below immediately offset that Judgment by assessing costs against the mineral owner of approximately $3,000.00 up to the appellate level. So, in the final analysis the mineral owner ends up owing moneys to the surface owner and the railroad for the legal injuries which the surface owner and the railroad, as *co-tortfeasor,* inflicted and under which she is still suffering.

The Trial Court attacks the credibility of the mineral owner because she was unable to produce a bona fide operational plan with her rights pre-empted. Her attorneys should have *refused* to file a More Definite Statement as was required of her under Federal Rules of Civil Procedure, Rule 12 (e), on the grounds that the Trial Court's interlocutory Order of December 19, 1951 went outside the ambit of the Bill of Complaint and further on the grounds that an Order requiring her to file an operational plan with

a *present intention* of commencing mining operations was absolutely humanly impossible for her to obey, while the surface owner remains so located. The Trial Court, in making that requirement, actually forced the mineral owner to exercise her rights in order to protect them. (See *Hagan* v. *Norton Coal Company*, 137 Va. 140, 119 S. E. 153 (1923).) Refusal to file the More Definite Statement would have caused the Trial Court to issue an Order of Dismissal which Order her attorneys could have *then* appealed to the Supreme Court of the United States. Her attorneys' letters of explanation of this erroneous Order appear at pages 61 to 64. Or, perhaps a Counter-Motion for a Summary Judgment in her favor would have been the proper procedure.

However, this Order for a More Definite Statement allowed the Defendants to maneuver the Plaintiff into a bad position or that of forcing the Burden of Proof upon her. While at the same time, it allowed the Defendants to jockey for a strong position which they could not only defend satisfactorily but which, with ample cooperation from her attorneys, they felt certain to prevail in. The Order, if obeyed, practically defeats itself because it would cause the Plaintiff to expend fabulous fees for expert engineering services in producing elaborate operational plans and specifications which she might never be able to use if the Doctrine of the Balance of Convenience was to weigh against her State Civil Rights and the 1,400 acres coal she desires to process and ship interstate from a plant site on the right of way of a chartered common carrier railroad, by lease contract. She has the physical means of delivering her coal to such a plant site without having to acquire any surface privileges due to Secondary Road 632 transversing the railroad's right of way, providing that the railroad would control its right

of way on her Upper Bond Tract under Virginia Laws, and its corporate powers and privileges. Instead, these corporations, with the aid of the Virginia State Corporation Commission and with the Governor's consent, are freezing the mineral owner of the dominant estate to an area off the railroad's right of way and are attempting to restrict her to Upper Bond tonnage, thereby sacrificing her Virginia State Civil Rights due her under the Constitution of Virginia. Economic and successful mining of Upper Bond coal depends upon the mineral owner's ability to process it, along with her 1400 acres, through one processing plant. Economic and successful mining of the Upper Bond tract also depends upon operating peacefully in an orderly manner under strict routine.

But if she is forced to limit herself to Upper Bond tonnage and made to accept second best location on Upper Bond for her plant site, and if she is forced to weave her installations over and under and through and among the maze of unlawful installations of the Defendants and operate handicapped and in an unnatural fashion, it is impossible for her to mine her Upper Bond coal and operate practically and economically. Her installation costs; her fire, liability and Workman's Compensation insurance rates will be higher; she will be unable to acquire labor easily; she will be forced to have a competitor underneath her feet, so to speak; she would be forced to have her non-union operation side by side with Clinchfield's union operation and the day by day friction would be endless. It would be impossible for her to keep track of her mine supplies and her equipment and the loss in man hours would be so great that the overhead would exceed the profit by far. It would be utterly impossible for this mineral owner to enjoy a successful and peaceful enterprise.

This mineral owner, in her ignorance and being without advice of counsel because of her inability to either

engage or retain counsel for reasons *absolutely beyond her power to control,* had endeavored to exercise her rights as best she could all alone, *satisfied beyond any doubt* that the *only* way to save her valuable rights was to exercise them and avoid the Doctrine of Laches from setting in. The Trial Court construed her heroic and almost superhuman effort for a lady to undertake, not as sincere effort on her part to mine her coal, but purely to interfere with and disturb the smooth and orderly operations of these two financially powerful corporations who would just as soon absorb her property rights and her State Civil Rights and obliviate them off the face of the earth. Instead, this wholesale disregard for her rights represented a challenge to her to *prove* that the individual's deed stands for something in America; that corporations cannot make a mockery of a property right and that a man's deed to his property is just as *sacred* as a man's will in death. This plaintiff had faith in the Courts of the United States to equitably protect her freehold in "the minerals buried in the depths or which crop out of the surface" of her Upper Bond Tract and her sole right to mine those minerals. *Virginia Coal & Iron Co.* v. *Kelly,* 93 Va. 332, 24 S. E. 1020 (1896), p. (336). Also see 58 C. J. S. Mines & Minerals §2 "Out Crop Coal", because being coal, it also is a part of her estate.

The Trial Court denies the plaintiff equitable jurisdiction leaving her to work out her own salvation while charging her with having extortion as her real intent and purpose, but had this been true, she would not have stopped with one defendant but would have tried similar methods of extortion on the railroad. Proof of this lies in the fact that since the railroad never invited her to make it any *settlement proposals,* now labeled "extortion demands", there are none on record.

The Trial Court cruelly picks out and sets apart one statement in her letter of April 9, 1948 as an example and upon which to base its erroneous opinion as to plaintiff's sincerity. But if that statement was printed within the entire text of her letter and if the Trial Court would judicially consider that letter along with Clinchfield's letter of April 3, 1948 just preceding hers which actually was a *leading* letter, *purposely* composed by Clinchfield's General Counsel, which masterpiece actually *provoked* the very statement which the Trial Court takes such offense to, some leniency could be granted the plaintiff and an allowance made for her inexperience in misinterpreting such a legalistic letter (App., pp. 97 to 100).

Their counsel's ingenious letter followed closely behind prolonged, dilatory and insincere negotiations by his client to lease her rights and more particularly closely followed an oral conference between the parties on March 25, 1948 during which she was asked: "How the controversy could be settled?" The terms tentatively but deceitfully agreed to that day by Clinchfield's (then) President were exasperatingly turned down point blank with no offer of a counterproposal, after she was formally invited to put the proposal in writing for presentation to Clinchfield's Board of Directors. The Trial Court's erroneous impression, *because no defense was advanced in her behalf by her attorneys,* is overshadowing the severe legal injury and inconvenience of such pressing character under which she is presently suffering by the Clinchfield Coal Corporation's ruthless and relentless and malevolent activities, for which the only remedy is an injunction, that a tragic miscarriage of justice has occurred.

Is it any wonder that the plaintiff, whose patience had been worn thin during the *crucial construction period* wrote the *fatal* letter of April 9, 1948, in bad grace certainly, but

again as only a statement of truth because of the legal injury which she recognized but was unable to define yet which the Trial Court defines but judicially refuses to recognize.

It is regretfully announced that due to having *selected* two unscrupulous law firms *who were willing to lay aside the Canons of Professional Ethics* and forced to resort to two less experienced attorneys, working at a disadvantage in this action, that the major aspect of it or the Mandatory Injunction for legal injuries was not carried up on Appeal to the Court below, and therefore cannot be reopened on an Appeal to The Supreme Court of The United States, as far as this petitioner can ascertain. So the very essence of her case and the relief that she was seeking is lost. Likewise, defendant Chesapeake & Ohio Railway Company was dismissed as a party to this joint action at the District and Appellate levels. A great deal of valuable evidence was not filed during trial which the very serious nature of it alone, much less the preponderance of it, would have shed a very different light on this case generally, and produced an entirely different set of Findings of Fact. But due to extraneous factors and strong adverse influences and perhaps even malicious gubernatorial interference on at least that portion of her case dealing with the illegal relocation of Virginia Secondary Road 632 on her property and with her Virigina State Civil Rights from a common carrier railroad to ship her coal holdings interstate, circumstances took place apparently which were and are today far beyond this petitioner's *power to control or cope with singlehandedly* and which greatly affected the outcome of her case.

Circumstances such as the Court's original Order for a More Definite Statement dated December 19, 1951 in

which the Trial Court clearly abused its judicial discretion, not being chronologically docketed by the Deputy Clerk or not until March, 1956 when this petitioner discovered it. In this same connection, it was signed apparently by a Grace V. Anthony, as Deputy Clerk, but on December 19, 1951, Grace V. Anthony was employed by the Treasury Department in Washington, D. C. and had been since February 6, 1951 where she remained until August 14, 1953. This information, obtained from the General Services Administration's Federal Records Center in St. Louis, Missouri, further disclosed that no Grace V. Anthony had ever been employed under the United States Federal Court System (see App., pp. 148 to 149). Another official document bearing the signature of still a third Deputy Clerk is in the plaintiff's possession which situation she is taking to the Administrator of the United States Courts.

This Petitioner has no way of knowing which set of Original Papers will reach the Supreme Court of United States. There could exist two sets of documents. She does know that two Answers to her More Definite Statement were made up. Answer No. One which was prepared by one of her two very high class engineering firms, Cadwallader Evans Jr., M. E. of Waverly, Pennsylvania would *require the filing of at least a tentative operational plan* for Upper Bond Coal and would lead to the preparation of a tentative operational plan to include all her coal holdings. The fact that no engineering studies were made and that the property lines were not even surveyed out, makes it appear evident that these two engineering firms were working hand in hand with her attorneys and were undoubtedly under the Defendant's subtle direction. This Petitioner discovered that the field representative from the Allen-Garcia Company of Chicago, Illinois, who was responsible for what weak

engineering work was done, was not a mining engineer but a civil engineer which accounts for core drilling sites being ill-advised and various other discrepancies in the *single* drawing she was *allowed* to file.

Another highly irregular situation is that Mrs. Ruth Lewis, Acting Court Reporter admitted *in writing* that she had not transcribed all her notes in transcribing the Record of the famous or infamous trial of *Mullins* v. *Clinchfield Coal Corporation* and *The Chesapeake & Ohio Railway Company.* Mrs. Lewis advises that she omitted argument on a "Motion" but which she calls "discussion." Whether anything else of importance was omitted and not made available to this petitioner's attorneys of record on Appeal, she has no way of knowing.

This petitioner does know however that her trial attorneys failed to file Petition requesting a Rehearing on the Order For a More Definite Statement as suggested in their letter of December 31, 1951. Her attorneys failed to file a *Memorandum of Law in Behalf of the Plaintiff* and none is docketed. Her trial attorneys purposely failed to file a *Rebuttal Brief in Behalf of the Plaintiff,* prior to Oral Argument December 20, 1954, after advising her *"that they were saving the best until last"* when she inquired why the Opening Brief in Behalf of the Plaintiff omitted any reference to that portion of her injury, dealing with the many continued trespasses. On October 15, 1953, after arguing the continued trespass pre-trial, her attorneys wrote that they had used the *Clayborn* v. *Camilla* and *Raven Red Ash* cases frequently during the argument and that Judge Barksdale seemed favorably impressed (see App., pp. 65 to 68). Such treatment from the legal profession, aside from being extremely unjust to the individual who is trying to save her rights, is certainly degrading to the fine profession of law.

This Petitioner also feels that when her trial attorneys allowed her to believe that a Writ of Mandamus would issue from a United States District Court on the Viriginia State Highway portion of her case and lulled her into a false sense of security, that those attorneys should be stripped of their right to practice law. In consequence of this, she is now facing an expiration date within which to file against the Commonwealth of Virginia and the two Commissions involved. However, her hands are tied because she now is satisfied that the Governor of Virginia is restraining her brand new law firm, employed since November, 1955, from filing in her behalf *until the time limit expires* on May 22, 1956. See Correspondence between Governor Thomas H. Stanley and Marjorie A. Mullins (App., pp. 126 to 128).

Directly following the Trial Court's opinion of December 20, 1954, the pressure to coerce her into selling her rights to Clinchfield was turned on full force. Mr. Gay first advised against a general appeal of the case omitting any reference to appealing the More Definite Statement or for the legal injuries which his letters of December 21 and 31, 1951 discussed at length (App., pp. 61 to 64). Instead, he urged vigorously that she sell her rights to Clinchfield. Each letter became more cuffing and brutal and seemed so oppressive, after five years of very harmonious client-attorney relationship. But each letter urged the sale of her property, as well as Dr. Mullins' *Lower* Bond tract which has the same injury. These letters are printed (App., pp. 69 to 83).

It was then that the Petitioner desired to engage another law firm to review her case looking toward an appeal. Stathers and Cantrall of Clarksburg, W. Virginia were engaged and did present a Report. Her counsel of record on Appeal used this incomplete Report as their bible and

failed to read between the lines of it. This Report and a follow up letter appear in the (App., pp. 84 to 96). But the theme was the same or that of selling out to Clinchfield for value of her coal in situ, with no regard for the valuable surface rights of easement. In fact, the letter of March 17, 1955 is contradictory within itself, for on page two it discusses the novel proposition of a mineral owner receiving wheelage royalty payments from a surface owner and then on page three urges the sale of the very rights which would yield the profit therefrom based only on the price of coal in place, relinquishing with it the valuable surface rights for next to nothing. Yet being fully advised of his client's weakened financial status, due to endless expenses incurred while trying to save these important rights, her counsel readily advised this unlucrative sale totally disregarding the true value of her claim.

But the most conclusive evidence against Mr. Gay, whom she loved and respected, was the last telephonic advises she had from him, after she had asked for her final bill, puzzled and worried because she was right back where she had started from ten long years ago, was to have him very sheepishly say to her; *"Mrs. Mullins, I believe I can get you wheelage royalty payments."* So, like Mr. Cantrall, Mr. Gay had been willing, only several short weeks ago, to sell out his client's valuable rights for an inequitable sum. In this petitioner's opinion, that amounts to fraud.

Therefore, in order to preserve her State Civil Rights as well as her valuable property rights, it is both urgent and imperative that The Supreme Court of United States exercise Its Power of Supervision. This Petitioner believes that she is at the mercy of this High Court to understand the rare and uncommon situation under which she is struggling and the peculiar and helpless position in which she has unsuspectingly been placed.

Hunton Williams Anderson Gay & Moore, whose basic employment was to arrange to get the mineral owner in and upon the tract mining coal because she had encountered extreme difficulty from both the railroad and Clinchfield and secondly, they were to arrange for the processing of the 1,400 acres of coal which she controlled under a lease contract with the railroad. The mineral owner pointed out that her engineer, Mr. Codell of the Codell Construction Company, Winchester, Kentucky as well as Mr. Morris of her *third* law firm Steptoe & Johnson of Charleston, West Virginia had suggested commencing mining operations as far as it was possible to go with Clinchfield so located, thereby inviting a Cease and Desist injunction from Clinchfield and force the burden of proof upon them. If that failed, then proceed to Court. But meanwhile, the company would be formed and business arrangements consummated. She handed Mr. Thomas B. Gay her financial statement to show that she was in position to operate but explained that she hoped to enter a partnership and that in 1948, she had lost such an offer.

## Reasons for Granting the Writ of Certiorari.

**1. The Trial Court has so far departed from the accepted and usual course of judicial proceedings and the lower Court has so far sanctioned such a departure, as to call for an exercise of this Court's power of supervision.**

In addition to the circumstances set forth in the Statement, this Petitioner when she first realized that her law firm had misrepresented her case to the Court, both factually and legally, wrote two confidential letters to Judge Alfred D. Barksdale so advising him, not suspecting that he also was implicated. However, she could never understand why Judge Barksdale sat for her case because he had had more than sufficient associations with her to absolutely

require that he disqualify himself. The Petitioner was always puzzled as to why her attorneys did not request another District Judge to sit, since she had advised them of her prior connection with Judge Barksdale concerning her controversy. She was warned by her attorneys, as she was approaching the Court House the morning her trial commenced, "not to state under oath that she had had these prior associations nor that Judge Barksdale has suggested counsel to her." Mr. Gay explained, "That if Judge Barksdale had one ounce of compunction, he would have disqualified himself."

This Petitioner advised Judge Barksdale of her counsel's misrepresentation of her case by letters dated April 28, 1955 and December 10 and 11th, 1955, before she reluctantly began to realize that he was implicated and probably was guilty of malfeasance. Judge Barksdale refused to exercise any extraordinary powers and bring her situation to light. She wrote to the Clerk of the United States Court of Appeals on February 20, 1956 and even earlier, in her Petition for a Rehearing, December 19, 1955, she made known her situation. On December 27, 1955, she advised Honorable Judge Morris A. Soper, United States Circuit Court of her difficulties because of her counsel's misrepresentation of her case to the District Court. She has taken her deplorable situation to Herbert S. Brownell, United States Attorney General and to President Dwight D. Eisenhower. She states sincerely that it has been like trying for Justice in Russia rather than in her own United States where she was born a strong, upright citizen. This Petitioner begs this Court to help her. (All letters cited above appear in the Appendix, see pp. 101 to 125.)

**2. The statement of the Court below "that the precised point involved on this appeal has not been decided by any court" raises an important principle of common law which should be determined by the Supreme Court of United States.**

The Court below states that "the Supreme Court of Virginia and other courts have discussed the reciprocal rights and obligations of mineral owners on the one hand and of owners of the residuum of the title or surface owners on the other, but the precised point involved in this appeal has not been decided by any court."

Therefore, will the Supreme Court refer to question number one and distinguish whether the mineral owner is correct in her contention that the surface owner's access to the lower stata is suspended until the mineral owner mines out all her coal meanwhile limiting the surface owner to usages not necessitating the disturbance of any coal, and if the surface owner desires to do more, *before that time arrives,* he should negotiate for the rights which he needs for himself and to deed to the railroad, in order to benefit his adjoining coal properties as well as the mineral properties belonging to others.

The mineral owner admits that once the coal has been removed in its entirety by her, the hole which she owns *no* title to under Virginia law reverts, by process of law, to the surface owner and she relies upon the *Chartiers Block Coal Company* v. *Mellon,* 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 A. S. R. 645 which the Virginia court quotes with approval in the *Clayborn* v. *Camilla Coal Company,* 128 Va. 383, 105 S. E. 117, 15 A. L. R. 946 at 393-4: to establish that until she mines out all her coal, the surface owner's "right of access to the lower strata is suspended" and it naturally follows that it would be unlawful for the surface owner to mine out her coal in order that

he may occupy the coal shell *earlier* that when it would normally revert. If the mineral owner has the right by deed to use and occupy it, then the surface owner is pre-empting her right to mine and occupy the shell when it takes possession illegally, regardless of whether it was in connection with a legal use of the surface or an unreasonable and unnecessary use, as is true in this instance.

**3. The decision herein is not in accord with the decisions of this Court on Good Faith in mineral cases and common law on trespass.**

The Court below being of the opinion that the trespass, if any, was not willful must have judicially failed to notice that the surface owner has not rebutted the plaintiff's presumption of an utter disregard for her rights or judicially failed to notice

a. That the surface owner failed to seek advice from its General Counsel as to whether it was within its legal right to occupy the premises, under the weak title it held, for its intention of benefiting its adjoining mineral properties but under which arrangement the railroad became co-tortfeasor and co-beneficiary. The surface owner also failed to legally ascertain whether it had the right to dig up any of the mineral owner's coal in order to occupy the containing shell or chamber for the sole benefit if its vast mineral holdings. In the *Pittsburgh & West Virginia Gas Co.* v. *Pentress Gas Co.*, 84 W. Va. 449, 100 S. E. 296, 7 ALR 901 (1919); an action for the wrongful removal of oil, the Court stated:

> "This doctrine is announced in other cases decided by this court, and is well sustained both upon reason and authority. Why should one be treated as acting in good faith when dealing with property as his own, when he knows all of the facts which con-

stitute his claim, as well as the claim of his adversary, which facts, when properly construed, give him no title to the land? Such a holding would make every man a judge of the law in his own case, instead of being bound by the law as interpreted by those charged with that duty. We must therefore conclude that the defendants, when they drilled the wells on these lands, were willful trespassers, just as much so as though there had been no question but that the plaintiffs had the superior right. They could not decide the disputed question in their own favor, and then proceed with the hope that their acts would be characterized by this court as in good faith, even though their judgment upon the law of the case should not be approved." 84 W. Va. at 453, 100 S. E. at 298, 7 ALR at 905.

b. That the surface owner did not notify the mineral owner of its intentions to remove her coal thereby allowing her opportunity to compute and salvage her coal, or to *appraise its value in light of the necessity for its removal,* or to seek legal advice if she believed the removal of her coal to be unreasonable and unnecessary and therefore unlawful and take immediate legal action to prevent its removal, which proves that the surface owner did not believe in *good faith* that it was within its legal rights but rather that the surface owner desired to take advantage of the fact that the mineral owner resided in New Jersey and preferred to establish itself first so that later, the surface owner could plead the Doctrine of the Balance of Convenience for its three million dollar plant and appurtenant installations.

The Petitioner's view of this phase of the case was well stated by Judge Fox in his dissent in *West Virginia-Pittsburgh Coal Co.* v. *Strong,* 129 W. Va. at 850, 42 S. E. 2d at 56, where he said:

> "The majority opinion, in effect, denies what the 1904 deed expressly granted, namely, the right to remove *all* [Italics are Judge Fox's] the coal then conveyed; for if the coal can be removed only as alleged in the bill, by the single method, strip mining, now sought to be employed, the right of the plaintiff to remove its coal is absolutely destroyed. I can see neither moral nor legal justification for that inescapable result, but that aspect of the case does not appear to have been considered by those who concur in the majority opinion, or, if considered, was not deemed of sufficient importance to merit discussion."

c. That the surface owner did not negotiate for a right of easement to use the mineral owner's remaining coal in situ for transportation purposes in bringing the 66,000,000 tons of coal from its adjoining coal properties over, upon and through the mineral owner's freehold estate, nor offer to compensate her for that privilege.

The surface rights in the residuum take on the character of an easement and are restricted in proportion to the strength and breadth of the dominant mineral deed to which these rights are subject.

In the Virginia case cited by the court, *Watts* v. *Johnson, etc., Real Estate Corp.*, the following was quoted with approval from 14 Cyc. 1215:

> " 'If the owner of an easement exceeds his rights, either in the manner or the extent of its use, or if he enters upon or uses the land of the servient estate for any unauthorized purpose, he is guilty of a trespass, and the servient owner may maintain such action, although no actual damages have been sustained by him.' " 105 Va. at 524, 54 S. E. at 319.

The mineral owner contends that Clinchfield did not have any right to dig up her coal for the benefit of other

tracts and that such use by surface owner "places an additional and unlawful burden" upon her mineral estate.

d. That the surface owner did not notify the mineral owner *nor her attorneys* when it removed additional coal during the *pendency of this action* and placed more improvements on the lower strata and likewise did not notify her when more surface improvements were added and the public truck ramp was installed. In such a situation the language used in *Pittsburgh & West Virginia Gas Co.* v. *Pentress Gas Co.*, 84 W. Va. 449, 100 S. E. 296, 7 ALR 901 (1919), an action against a repeated trespasser is appropriate:

> "* * * In this case, as before observed, the defendants were fully informed as to the facts, and committed the acts which resulted in the extraction of the oil with this full knowledge, and with the further knowledge that their interpretation of the law was vigorously contested by the plaintiffs. It may be said that the defendants had such confidence in their judgment as to be willing to take the risk of an unfavorable decision. Entire good faith, it occurs to us, would have dictated to them that the proper course would be to wait until the controversy had been finally determined before expending large sums of money in drilling upon the land." 84 W. Va. at 452, 100 S. E. at 297, 7 ALR at 904.

e. That the surface owner *still* defiantly holds to its theory, *even during the trial of this case,* that it could mine out the mineral owner's *entire freehold estate* and plead immunity to any wrongdoing *if* in the course of its surface installations it *became necessary to do so.* This indicates an utter disregard for her rights and an unwillingness on the surface owner's part to recognize her ownership. Even the very surface rights it owns, is subject to the mineral

owner's dominant rights with broad, strong surface easements. This mineral owner can only stand by *powerless* to save her estate from being recklessly and completely destroyed.

Mr. A. R. Matthews, president of Clinchfield from September of 1946 to November of 1951, testified on cross examination as follows:

> "Q. I believe you said that you didn't intentionally or the company didn't intentionally, take any of Mrs. Mullins' coal? A. That is correct.
>
> "Q. It intended to make the cut that was made, didn't it? A. It did.
>
> "Q. And whatever it took out in making that cut was a part of the intent to make the improvement at that point, was it not? A. The company took none of the coal. It moved some of the coal but didn't take it elsewhere and dispose of it.
>
> "Q. It removed it and then dumped it over the side of the slope? A. Pushed it over the side of the slope with a bulldozer." (T. 976-7).

It seems to be Mr. Matthews' view, one hardly recognizable in law, that the removal of Mrs. Mullins' coal constituted no wrong since it was not taken elsewhere and disposed of, except as fill.

The testimony of Mr. R. H. Hughes, president of Clinchfield from January of 1953, up through the time of trial, clearly sets out the official position of the appellee in the matter. He stated that it was Clinchfield's opinion that it as surface owner had the right to remove *any or all* of the mineral owner's coal in order to prepare foundation sites for its construction, and this could be done even if it meant the *destruction of all of appellant's coal.* In this connection he testified as follows:

> "Q. And you thought that [the excavations for the slack bin] was within the rights of Clinchfield as the surface owner? A. Absolutely, and of course it

was done after some consideration. This controversy was well under way at that time.

"Q. And you made it with knowledge of the plaintiff's contentions as to her rights? A. Yes, sir. We felt that in the proper use of the surface if we wanted to erect a structure for a bin, which required that the foundations extend to her rock on her shale material which would support the structure, we were within our rights to go down to that firm structure for the foundations.

• • • • • •

"Q. So that by that token you could have destroyed all the coal in the Upper Bond tract and pleaded immunity, could you not?

• • • • • •

"A. Following strictly the words I have said to an obvious end the answer would be yes." (T. 1183-1185).

In *United States* v. *State of Wyoming*, 331 U. S. 440, 91 L. Ed. 1590, 67 S. Ct. 1319 (1947), *rehearing denied*, 332 U. S. 787, 92 L. Ed. 370, 68 S. Ct. 37, an action to recover damages for the wrongful removal of oil, the Court said:

"• • • It is also clear that when suit is brought for the value of minerals wrongfully removed from the plaintiff's land, and the trespass and conversion are established, the burden of pleading and proving good faith is on the defendant. The 'good faith' contemplated by these rules is something more than the trespasser's assertion of a colorable claim to the converted minerals." 331 U. S. at 458, 91 L. Ed. at 1600, 67 S. Ct. at 1328.

In *French* v. *Stange Mining Co.*, 133 Va. 602, 114 S. E. 121 (1922), a suit in equity for discovery and an accounting for the value of manganese ore unlawfully mined and removed, the court said:

> "It is true, as held in *Wood* v. *Weaver, supra,* [121 Va. 250, 92 S. E. 1001] that 'every trespass is *prima facie* willful, and the trespass being conceded or proven, the burden of proof is on the defendant, unless it appears from the evidence of the plaintiff, to show that the trespass was not willful.' " 133 Va. at 619, 114 S. E. at 126.

f. That the surface owner did not negotiate with the mineral owner for her valuable rights of easement so that it, as industry, can fulfill its commitments to a common carrier railroad and deed the railroad general warranty fee title to its plant site and the road change. But instead, private industry is causing the railroad, after taking its right of way for fourteen miles *lawfully* "by purchase or condemnation or otherwise control" to violate its charter powers and laws of Virginia when it arrives at the Upper Bond tract, which tract the railroad is forced to cooperatively *hop over* and then can continue its *lawful* acquisition of the balance of the right of way. Industry is thereby causing the railroad to abuse its charter, disobey the Laws, and sacrifice an individual's State Civil Rights in order to save its investment. It would appear that the surface owner has not proved its good faith either toward the railroad which built a three million dollar spur to serve its preparation plant nor good faith toward the Commonwealth of Virginia under whose laws it *also* is chartered nor good faith towards the mineral owner whose rights this surface owner has preempted, whose coal it has unlawfully removed and whose property right of alienation it has totally destroyed.

*Swiss Oil Corp.* v. *Hupp,* 253 Ky. 552, 69 S. W. 2d 1037 (1934):

> "• • • To be sure, the mere testimony of the person affected that he acted in good faith and honestly

believed he was right in the position he assumed is not conclusive or, indeed, sufficient of itself to entitle him to the advantage of one occupying the place of innocence or good faith. The test to be applied is that of intent, but, being a state of mind, *it can seldom be proved by direct evidence.* The conditions and behavior are usually such that the court can determine whether the trespass was perpetrated in a spirit of wrongdoing, with a knowledge that it was wrong, or whether it was done under a bona fide mistake, as where the circumstances were calculated to induce or justify the reasonably prudent man, acting with a proper sense of the rights of others, to go in and to continue along the way. * * *." 253 Ky. at 560, 69 S. W. 2d at 1041. (Italics added)

When the trespass and conversion are established, the burden of proof is on the defendant to show that the trespass was not willful. 21 ALR 2d 380; 36 Am. Jur., Mines and Minerals §231; 58 C. J. S. Mines and Minerals, §137.

Such actions on the part of the surface owner almost take on the character of malicious intent toward her while on the other hand, Ex. 120 (App., pp. 145 to 147) will prove *beyond a doubt* that the mineral owner's good faith *is established.* When lacking counsel to advise her and *not* being assured of her legal position, she did what any honest individual would do or go to the surface owner and try to negotiate for the additional rights she believed that she must acquire in order to process and ship from Upper Bond her 1400 acres of coal, even though by leasing a plant site from the railroad and with a public road traversing that right of way, she later realized the rights which she was seeking would have been unnecessary. Nevertheless, the surface owner denied her the very rights of easement which they were illegally using of hers.

The West Virginia court has stated the principles here involved, in the following language:

> "Whether the trespass was innocent or willful, of course, does not affect the right, but merely the amount, of recovery. Defendant does not claim that it should, under the alleged agreement, be relieved from paying for the coal mined from section 1. If the coal was removed through innocent mistake or inadvertence, it would be compelled to pay for it, but at its value in place. However, if the trespass was willful, then the value at the tipple or pitmouth would be the basis of recovery, the defendant not being allowed to deduct from that value any expense for mining or hauling the coal to that point." *Pan Coal Co.* v. *Garland Pocahontas Coal Co.*, 97 W. Va. 368, 378, 125 S. E. 226, 230 (1924).

That the courts generally accept and apply the foregoing rules is indicated in 36 Am. Jur., Mines and Minerals §231; 58 C. J. S. Mines and Minerals, §137, pp. 237, 239. See also annotation "Oil or Minerals—Trespass—Damages" in 21 ALR 2d 380 and 7 ALR 908.

**4. The decision of the Court below is not in accord with applicable decisions pertaining to coal mining law.**

The Trial Court in its Oral Opinion of December 20, 1954 on page 111 refers to the surface owner's mine tracks on the slope which haul its 66,000,000 tons of coal on to Upper Bond and over and through and upon the mineral owner's estate by saying: "It might require the removal of some of the Defendant's structures so she can mine there . . ." However, the Trial Court did not require their removal although, while these installations remain so located, the mineral owner's ability to both occupy the containing chamber to which she *alone* holds title to the occu-

pancy thereof, as well as her ability to mine the coal in situ beneath these mine tracks, is pre-empted in the first situation and impossible in the latter instance. Neither did the Trial Court award the mineral owner "Wheelage Royalty Payments" (common terminology in the coal industry) for the unlawful use of the containing chamber and use of her coal in place from 1948 until July 25, 1951, the date her Bill of Complaint was filed even though No. (7) under the Prayer in the Bill of Complaint requests: "That the Court grant plaintiff all such other, further and additional relief as the nature of her case may require and to the Court shall appear proper."

The plaintiff relies upon the principle of law holding in the *Clayborn* v. *Camilla, est., Coal Co.,* 128 Va. 383, 105 S. E. 117, 15 ALR 946 (1920) and which was reaffirmed in 1946 in *Raven Red Ash Coal Co.* v. *Ball,* 185 Va. 534, 39 S. E. 2d 231, 167 ALR 785.

In that case plaintiff, Ball, owned the surface of a tract of land on which the defendant coal company owned the minerals with an easement to haul coal from certain other property over plaintiff's surface estate. When defendant began transporting coal over plaintiff's land from 5 small tracts of land not covered by the easement, plaintiff waived the tort and sued in assumpsit for the illegal use and occupation of his land. In holding that he was entitled to recover, the court said:

> "Ball concedes that defendant exercised its right in transporting across plaintiff's land the 950,000 tons of coal mined from tracts of land formerly owned by Doran and Dick, but contends that it violated the property rights of plaintiff in transporting the 49,016 tons of coal mined from the five small tracts described above across plaintiff's land to defendant's tipple. *This principle was settled by this court* in *Clayborn* v. *Camilla Red Ash Coal Co.,* 128 Va. 383, 105 S. E. 117, 15 A. L. R. 946. See *Davenport* v. *Lamson,* 21 Pick. (Mass.) 72; *Apple-*

*ton* v. *Fullerton,* 1 Gray (Mass.) 186; *Watts* v. *Johnson, etc., Real Estate Corp.,* 105 Va. 519, 54 S. E. 317; *Moore* v. *Lackey Mining Co.,* 215 Ky. 71, 284 S. W. 415, 48 A. L. R. 1402; *Henry* v. *Tennessee Elec. Power Co.,* 5 Tenn. App. 205.

"These cases hold that every use of an easement not necessarily included in the grant is a trespass to realty and renders the owner of the dominant tenement liable in a tort action to the owner of the servient tenement for all damages proven to have resulted therefrom, and, in the absence of proof of special damage, the owner of the servient tenement may recover nominal damages only." 185 Va. at 538, 39 S. E. 2d at 233, 167 ALR at 788.

These two cases *this mineral owner located and brought to her attorneys in* 1953 requesting them to amend the Bill of Complaint stating she felt that there was another element of injury which was not included therein. She was *assured* that No. 7 in the Prayer covered this injury. While it is true that the offending part is reversed in her situation, and the offending party is the surface owner, the principle of law remains unchanged. The plaintiff feels that the Trial Court's interlocutory Order of November 27, 1953 denying her motion for a Summary Judgment constitutes reversible error because no recognition was given to her legal injuries although by Argument on October 13, 1953 and in the Brief supporting Plaintiff's Motion For a Summary Judgment filed November 13, 1953, her attorneys used these two cases at length. Their letter to her of October 15, 1953 giving the highlights of the argument they advanced and Judge Barksdale's reaction appears (see App., pp. 65 to 68); (see other correspondence between Marjorie A. Mullins and Hunton, Williams, Gay, Moore & Powell; see related documents, App., pp. 150-201). However, her attorneys did not appeal the Order, denying her a Summary Judgment, to the Supreme Court of United States.

Her attorneys in their

**Memorandum For Plaintiff in Opposition to Defendants' Motion to Strike Out Plaintiff's More Definite Statement and In Support of Plaintiff's Motion For Summary Judgment,**

said:

• • • • • •

"Since Defendants have, therefore, for the purpose of this Motion, admitted the excavation and destruction of large quantities of valuable coal belonging to the Plaintiff and that they have exposed to deterioration and damage other large quantities thereof, it seems obvious that the motion to dismiss the Complaint as a whole should be denied, since Plaintiff is entitled to her day in court in order to prove the allegations of Paragraph 10 of the Complaint and, if she does, should recover damages in the amount of the fair value of her property.

Counsel for Clinchfield argue that Plaintiff also contends in this connection that she is "entitled to recover damages for each car of coal which Defendant has transported over the mine track to its tipple . . ." (Br. p. 16), and assert that neither the *Camilla Red Ash Coal Company* case (128 Va. 383) nor the *Raven Red Ash Coal Company* case, (185 Va. 538) support her contentions in this respect. Plaintiff respectfully submits that these decisions are very much in point and support her contention *that a wrongdoer may not profit by his own wrong.*

Plaintiff has title to the coal in and under the Upper Bond Tract and this constitutes the ownership of *land* as fully as does Defendants' ownership of the surface. In *Shell Oil Co.* v. *Moore* (Ill. 1943), 48 N. E. 2d 400, the Court said:

" . . . Coal and minerals in place, where the title thereto has been severed from the title to the surface, *constitute land as fully as does the surface,* and as such are subject to all the laws of possession, . . .

and the owner thereof has all the rights of an owner of land."

For the same reasons, therefore, that Clinchfield contends that "Any use of the land of the 'surface owner' for any purpose other than the mining of the minerals from said land, is a violation of the rights of the 'surface owner,'" Plaintiff contends that any use of the minerals by the owner of the surface is a violation of her rights as mineral owner.

Plaintiff is therefore entitled to prove what appears from Mr. Evans' affidavit to be a fact, namely, "that Clinchfield Coal Corporation, in the course of its location of its tram tracks on the south slope, and in order to provide an adequate road bed for their construction stripped considerable quantities of coal out-cropping on its adjacent property and on the property of the plaintiff, and has so located its mine opening and ventilator tunnel on its own property as to make apparent where the coal deposits are."

It was argued at the hearing and reiterated in the brief that "It is a matter of common knowledge that out-crop coal is of no value . . ." (Br., p. 22). There is nothing in the record to support this contention and, even if it be assumed to be true, the statements in Mr. Evans' affidavit relating to the stripping of "coal out-cropping" to which counsel for Clinchfield refer, were made for the purpose of showing that Clinchfield needed no more definite statement of Plaintiff's claim as to the location of the seam or seams of coal since it had full knowledge of their whereabouts, through cutting away the out-cropping and exposing them in the process of constructing a road-bed for its tram-tracks. But whether "coal out-cropping" is, or is not of value, being *coal* it was the Plaintiff's property and Clinchfield committed a trespass in excavating and removing it for which it should be held liable in damages. As was aptly said in *Camilla Red Ash Coal Company, supra:*

". . . It is said, and is apparently true, *that no substantial pecuniary damage* is being done to the appellants by the use of the tunnel. The same might be said of the use of many other rights of way. A land owner might grant a right of way through his land to haul timber from that land and the grantee might be able to bring over that right of way timber from an adjoining tract *without doing any additional damage,* and yet nobody would question the right of the land owner to prohibit and enjoin such additional use of the way. *The violation of a property right is a legal injury.*"

Plaintiff fully expects to prove, if afforded an opportunity to do so, that valuable coal was excavated and removed by Clinchfield. This she has the plain right to do under the broad averments of Paragraph 10 since the authorities are unanimous in holding that a complaint should be viewed in the light most favorable to the plaintiff and never dismissed for failure to state a claim "if it appears that any relief could be granted on the facts stated." *Topping* v. *Fry,* 147 F. 2d 715 (7th Cir. 1945).

In *Dennis* v. *Village of Tonka Bay,* 151 F. 2d 411 (8th Cir. 1945), the Court said:

"There is no justification for dismissing a complaint for insufficiency of statement unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim."

In *Carroll* v. *Morrison Hotel Corp.,* 149 F. 2d 404 (7th Cir. 1945), it was also held that:

". . . on a motion to dismiss . . . the rule is that the complaint must be viewed in the light most favorable to the plaintiff, and the truth of all facts well-pleaded, admitted . . . No matter how likely it may seem that the pleader will be unable to prove

his case, he is entitled, upon averring a claim, to an opportunity to try to prove it."

To the same effect, see *Kohler* v. *Jacobs,* 138 F. 2d 440 (5th Cir. 1943), in which it is held that:

"... and unless it clearly appears that the facts do not authorize relief, or that relief is barred by some fact alleged, the matter ought to be further examined by summary judgment proceedings or by a trial."

It is true, as stated by counsel for Clinchfield, that the *Camilla Red Ash Coal Company* and the *Raven Red Ash Coal Company* cases involved claims of surface owners against the owners of the mineral rights in land, but the principle of law which the Court recognized and applied in those cases is the same *irrespective of which is the offending party.* In the instant case, Mr. Evans' affidavit shows and Plaintiff expects to prove, if given an opportunity to do so, that in order to provide a road bed for its tram-tracks, Clinchfield excavated and removed large quantities of coal from the position it occupied in its natural state. Had this coal laid wholly underground, a tunnel through the earth would have resulted, which, when all of the coal had been removed from it, would, as Clinchfield contends, have reverted to it as owner of the surface. But until *all* of the coal has been so removed by the owner of the mineral rights, the owner of the surface of the land has *no* title to or control over the empty tunnel. So until Plaintiff has removed all of the coal from the seam which Clinchfield has excavated in part to construct its tram-tracks, she is the owner of such coal and entitled to full possession and control of the *area* naturally occupied by it, as well as that *area* formerly occupied by the coal removed by Clinchfield. Clinchfield has made this impossible by appropriating to daily use in the transportation of its coal from its

mine on adjacent property to its tipple on the Upper Bond Tract the area occupied by a part of the coal in and under the land which is owned by Plaintiff. Having unlawfully appropriated to itself the area once occupied by a part of Plaintiff's coal, Clinchfield now contends it may continue to operate in the semi-exposed tunnel thus created without liability. In effect, it contends that as a wrongdoer it may continue to profit by its own wrong. The decision in *Camilla Red Ash Coal Company, supra,* completely refutes such a claim when it said:

> "The tract through the Helton tunnel rests upon land owned by the appellants. The coal Company has the unquestioned right to use that tunnel so long as it needs it in hauling coal from the residue of the Helton tract. The appellants have never challenged that right. The use of it for any other purpose is a trespass, and the continued and daily use which the company is now making of it is a continued trespass, for which the only adequate remedy is an injunction. 1 High on Injunctions (4th ed.), secs. 22, 692, 702, 702-a; 4 Words & Phrases, p. 3773, *et seq.;* 2 Words & Phrases (N. S.), p. 1206, *et seq.*"

It is respectfully submitted, therefore, that Paragraph 10 of the Complaint states a claim upon which Plaintiff is entitled to relief, and for this further reason Defendants' motions to dismiss should be denied.

5. *Plaintiff's Motion for Summary Judgment is not Inapposite and Should be Granted.*

Under Rule 12(b) a defendant may assert any one of seven defenses "before pleading". One of these (the sixth) is that the complaint fails "to state a claim upon which relief can be granted". The pending motions of the Defendants are based upon this ground. The rule further provides that—

"If, on a motion asserting the defense numbered (6) *to dismiss for failure of the pleading to state a claim upon which relief can be granted,* matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

Since Defendants rely in support of their motions upon "matters outside the pleading" which were "presented to and not excluded by the court", namely, the original affidavit of Mr. Hughes dated and filed December 6, 1951, and supplemental affidavit of Mr. Hughes of September 24, 1953, with the accompanying maps marked Exhibits A and B, respectively, their motions are, *by the foregoing provisions of Rule 12(b),* required to "be treated as one for summary judgment and disposed of as provided in Rule 56 . . .".

Had the matter come on for hearing merely upon Defendants' motions, the only action properly to be taken by the Court would be to sustain or deny Defendants' motions. Since upon a hearing of these motions and the affidavits filed by the Plaintiff *in opposition thereto* it would appear that there is no genuine issue as to any material fact relevant to Plaintiff's claim *that the tipple, preparation plant and other structures of Clinchfield are of such kind and character and are so located as to obstruct and prevent, as a practical matter, the mining of the coal upon the Plaintiff's property,* a counter motion for summary judgment under Rule 12(b)—and not under Rule 12(c) as argued by counsel for Clinchfield (Br. p. 16)—was filed by Plaintiff.

In support of that counter motion, reliance was had in the oral argument upon the uncontroverted fact appearing from the affidavit of Mr. Evans in which he pointed out:

". . . that such a structure [Plaintiff's tipple] should in my opinion be most conveniently and economically located *on the site now occupied by the tipple and attendant structures of Clinchfield Coal Corporation* since, when so located it would afford the plaintiff the shortest haul by tram-cars from any mine opening into the Clintwood Seam on the south slope, the best means by gravity or mechanically for passing coal from mine cars into such a tipple, and ready access for loading prepared coal from such a tipple into railroad cars for transportation to market. . . ."

It should be pointed out in this connection that copies of all of the affidavits upon which Plaintiff relied were served upon counsel for the Defendants by mailing them copies thereof on October 8th, four days before the argument on October 12th. Ample opportunity was therefore afforded their clients to file counter-affidavits or otherwise controvert the unqualified showing there made in Plaintiff's behalf. The Defendants elected to go to a hearing upon the record as thus made and since the facts upon which Plaintiff's counter-motion for summary judgment were based are uncontroverted, the motion is well founded and should be sustained.

## Conclusion.

For the foregoing reasons, it is respectfully submitted (1) that it was error for this Honorable Court to have entered the Order of December 19, 1951, (2) that Plaintiff has, however, fairly and fully complied with its requirements under the circumstances of the case, (3) that Defendants' motion to dismiss the Complaint for failure to state a claim should be denied, and (4) that Plaintiff's counter-motion for summary judgment under Rule 12(b) should be sustained and a mandatory injunction entered requiring Clinchfield to remove its structures and installations and referring

to a commissioner or to trial by jury the question of the amount of the Plaintiff's damages.

Respectfully submitted,

HUNTON WILLIAMS ANDERSON GAY & MOORE,
Counsel for Plaintiff.

THOMAS B. GAY,
ARCHIBALD G. ROBERTSON,
of Counsel.

Dated: November 13, 1953."

These dishonorable attorneys led their client to believe that she was in good hands. They allowed her to believe that all phases of her legal problems were receiving expert attention in preparation for trial. But all the while, they were concealing the defendant's guilt by not disclosing to her that her encroachments were due to violations of their surface rights. By keeping her in the dark and letting her go to court with no engineering data to support her complaints, with no defense planned for her, and deliberately causing her to lose her case, these attorneys could continue their joint plot to coerce her into selling her rights to Clinchfield.

## Conclusion.

The individual must look to the Courts for relief and must rely upon the honesty and integrity of the law firms that she selects to represent her. For a group of unscrupulous attorneys to make a mockery of our judicial system, by conducting a "mock trial" using a United States Court room as a *tool* to deliberately provoke a miscarriage of justice is a disgrace to this country.

The pre-trial procedures are of extreme importance to the Plaintiff and for her attorneys not to make full use of

them and appeal them on up to the Supreme Court of United States if necessary, is conclusive proof of a deliberate attempt to mishandle her case. Likewise, the Briefs and Memoranda of Law should be prepared with great skill and thoughtful attention. The law of a case is as important to the client as a diagnosis is to the medical patient.

The Plaintiff has sat in law offices until she feels wedded to them. She has endeavored to absorb much coal law trying hard to define her rights and injuries for herself when law firm after law firm evaded giving her satisfactory answers to her problems. She feels that this perfectly planned, skillfully executed plot, combining the efforts of counsel *for and against the Plaintiff,* was designed to deliberately cause a Miscarriage of Justice which ultimately would work to Defendant Clinchfield's benefit. No corporations, no matter how powerful and financially independent they are, should be able, *much less dare,* to obstruct Justice.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

Marjorie A. Mullins,
15 Fourth Street,
Frenchtown, New Jersey.
Petitioner.

# APPENDIX.

## Opinion of the United States Court of Appeals, for the Fourth Circuit.

UNITED STATES COURT OF APPEALS,

FOR THE FOURTH CIRCUIT.

---

No. 7046.

---

MARJORIE A. MULLINS,

Appellant,

*versus*

CLINCHFIELD COAL CORPORATION,

Appellee.

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ABINGDON.*

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(Argued October 14, 1955. Decided November 18, 1955.)

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Before SOPER and DOBIE, Circuit Judges, and THOMSEN, District Judge.

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A. G. COLLEY, JR., and L. V. MCFALL for Appellant, and WM. A. STUART and A. G. LIVELY for Appellee.

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THOMSEN, District Judge:

Appellant, plaintiff below, is the owner of the mineral and mining rights in a tract of land known as the Upper Bond Tract in Wise County, Virginia. Appellee, defendant below, is the owner of the residuum of the title, and

mines coal on neighboring tracts. The questions presented by this appeal are: (1) whether defendant was guilty of a willful trespass in excavating sites for a tipple and slack bin and in grading a sidecut for tramtracks on the Upper Bond tract, as a result of which some outcrop coal and other coal lying adjacent to the outcrop, together with a quantity of earth and stone, was pushed over the side of the slope with a bulldozer; and (2) whether plaintiff, as owner of the mineral rights, is entitled to any damages for such displacement, and, if so, the measure thereof. The district judge allowed plaintiff damages for the coal displaced at its royalty value, 25¢ per ton. Plaintiff claims that she is entitled to the full market value of the coal without deduction for costs of extraction. On the other hand, defendant claims that the material displaced was "just soil", outcrop coal, unminable and of no value, and not a part of plaintiff's mineral estate. Defendant, however, took no appeal from the order awarding plaintiff $1,363.50 damages.

In November, 1944, plaintiff purchased for $3,250.00 "all of the Coal, gas, oil and mineral rights" in the Upper Bond tract. The deed provided:

> "It is expressly understood between the parties hereto that this conveyance deals only with the mineral rights, and that the title to the land or surface is to remain in the grantors, their heirs or assigns, grantee shall have the right to dig, mine, excavate, drill, prepare for market and remove or carry away the said coal, gas, oil and minerals without liability for damages to the surface or anything thereon, nor shall grantee be liable for damages for sinking of any water on said land; with right of ingress and egress for purposes of exercising their mining rights hereunder."

Defendant acquired the residue of the title to said tract in May, 1945, for $2,500.00. There is mineable coal on the tract sufficient to justify plaintiff in undertaking to mine

the coal if she wishes to do so, but it is doubtful if such an operation would be profitable.

In October, 1945, defendant offered to purchase plaintiff's coal and mineral rights in the tract, but plaintiff did not wish to sell. In the summer of 1947 defendant began the construction of a tipple and other facilities on Upper Bond. Plaintiff at first indicated no objection, but tried to work out with defendant a lease of her interest in the tract. In February, 1948, plaintiff broke off these negotiations, told defendant that she planned to mine the Upper Bond coal herself and that her operations would require the entire surface of Upper Bond, and called upon defendant to remove therefrom within thirty days all its construction, sidings, machinery and materials. Defendant declined to comply, but offered to cooperate with plaintiff in her mining operations.

Up to February 16, 1948, defendant had spent $200,000 and committed an additional $700,000 on the tipple and other improvements on Upper Bond, including the grading of the tramtrack level. Defendant had also spent very substantial sums in opening a mine on adjacent land, to be served by the tipple. Since the institution of this suit in July, 1951, defendant has made the necessary excavations and erected a slack bin on Upper Bond at tramtrack level, near the tipple.

The district judge found that from and after February 16, 1948, plaintiff at no time had a bona fide present intention to mine the Upper Bond coal, and that from and after that date her intention and efforts were to force Clinchfield to settle her claim for a sum far in excess of the value of her interest in Upper Bond. On April 9, 1948, plaintiff wrote defendant that she had been informed by an attorney that she was "in position to demand a strong settlement.* * * The aggregate costs to you should not be computed in the terms of the value of my coal 'even if you were to destroy it', but to the costs to you of having the courts award me a verdict and compelling you to remove your improvements or pay an equal amount."

The District judge also found that defendant's improvements, operations and actions have not unreasonably restricted or prevented plaintiff from exercising her property rights on Upper Bond; that if and when plaintiff has a bona fide present intention to mine the Upper Bond coal, she is not unreasonably hindered or interfered with by defendant; and that at the time plaintiff acquired her title, the usual method of mining coal, known and accepted as common practice in Wise County, Virginia, was the method known as deep-mining. We adopt these findings.

The district judge found that defendant, in doing the grading and making the excavations for its improvements on Upper Bond, displaced 5,454 tons of outcrop coal and coal lying adjacent to the outcrop; that the royalty value of the coal was 25¢ per ton; and that defendant acted in good faith in displacing the 5,454 tons. "It believed in good faith that it was within its rights as owner of the surface estate in making the excavations, and further believed in good faith that the coal displaced had no market value." These findings are supported by substantial evidence and should not be disturbed.

Plaintiff originally claimed that defendant's improvements make it impossible for her to mine her coal, and prayed for a mandatory injunction requiring defendant to relocate or remove all its improvements, and for $500,000 damages. After taking 1,264 pages of testimony and examining more than 200 exhibits which were offered in evidence, the district judge, at the end of the whole case, concluded that plaintiff was not entitled to a mandatory injunction, nor to recover any punitive damages, nor to recover compensatory damages with respect to the coal remaining in place on Upper Bond, but was entitled to recover $1,363.50, the royalty value of 5,454 tons of coal displaced by defendant in constructing its improvements. The judge ruled specifically that defendant was not guilty of willful trespass in displacing the coal.

On this appeal plaintiff is not pressing for a mandatory injunction, and has raised only the question of the measure of damages applicable to the coal which was displaced by

defendant. The Chesapeake & Ohio Railway Company was originally joined as a party defendant in the suit, but the court dismissed the case against it, and plaintiff has not appealed from that ruling.

The Supreme Court of Virginia and other courts have discussed the reciprocal rights and obligations of mineral owners on the one hand and of the owners of the residuum of the title or surface owners on the other; but it does not appear that the precise point involved on this appeal has ever been decided by any court.

Plaintiff concedes that a surface owner may have the right to remove some of a mineral owner's coal in the reasonable exercise of its surface rights, but contends that defendant did not have the right to remove any of plaintiff's coal in order that it might use the space occupied by such coal in hauling and processing coal mined by it on adjacent land. Plaintiff relies upon *Clayborn etc. Coal Co.* v. *Camilla*, 128 Va. 383, 105 S. E. 117, 15 A. L. R. 946, a suit by a surface owner against a lessee of mineral rights to enjoin the lessee from using an underground haulway on the leased tract to haul coal which it had mined on an adjacent tract. The Supreme Court of Virginia held that this use of the underground haulway placed an additional and unlawful burden upon the estate of the surface owner, saying "* * * nothing but the coal and the right to remove it ought to be understood to pass by the deed". 128 Va. at 397. The court quoted with approval from *Chartiers Block Coal Co.* v. *Mellon*, 152 Pa. 286, 25 Atl. 597, 18 L. R. A. 702, 34 A. S. R. 645, as follows: " 'The grantee of the coal owns the coal but nothing else, save the right of access to it and the right to take it away. Practically considered, the grant of the coal is the grant of a right to remove it. * * *' ". 128 Va. at 393. To the same effect are *Raven Red Ash Coal Co.* v. *Ball*, 185 Va. 534, 39 S. E. 2d 231, 167 A. L. R. 785, and *Watts* v. *Johnson., etc., Real Estate Corp.*, 105 Va. 519, 54 S. E. 317. These cases give no support to plaintiff's position in this case.

The Supreme Court of Virginia has not yet decided whether such a deed as plaintiff received gives a right to strip mine coal, and if so, under what conditions and limi-

tations. The question has been discussed in other states; see *Commonwealth* v. *Fisher*, 364 Pa. 422, 72 A. 2d 568; *West Virginia-Pittsburgh Coal Co.* v. *Strong*, 129 W. Va. 832, 42 S. E. 2d 46; *Oresta* v. *Romano Bros.*, 127 W. Va. 633, 73 S. E. 2d 622; and the Supreme Court of Virginia has held that the mineral owner is not limited to such appliances as were in existence when the grant was made but may keep pace with the progress of society and modern inventions. But for the reasons set out below, it is not necessary for us on this appeal to determine whether or not plaintiff has the right to strip mine coal on Upper Bond, and we intimate no opinion on that point.

The rights of a surface owner to use the land are discussed in a number of cases, e.g., *Clinchfield Coal Corp.* v. *Compton*, 148 Va. 437, 139 S. E. 308; *Oakwood, etc. Coal Corp.* v. *Meadows*, 184 Va. 168, 34 S. E. 2d 392; *Preston County Coke Co.* v. *Elkins Coal Co.*, 82 W. Va. 590, 96 S. E. 973; *Chartiers Block Coal Co.* v. *Mellon*, 152 Pa. 286, 25 Atl. 579; *Imperial Elkhorn Coal Co.* v. *Webb*, 190 Ky. 41, 225 S. W. 1077; 36 *Am. Jur.* 400, *Mines and Minerals*, sec. 174.

None of the cases discuss the question whether the surface owner is guilty of a trespass if he removes or displaces outcrop coal or other coal in the exercise of his surface rights, nor what damages, if any, he must pay the mineral owner for such removal or displacement. We hold that a displacement of outcrop or other coal in the reasonable exercise of surface or residual rights does not constitute a trespass necessarily, although the mineral owner is entitled to compensation based upon the value *in situ* of the coal displaced. In passing on the question of reasonableness the court should consider all of the circumstances surrounding the original conveyances, the nature of the land and of the use which the respective parties have made of it or, bona fide contemplate making of it in the future, the nature, quality and location of the coal or carboniferous material displaced or removed, and the use which the surface owner made thereof.

However, it is not necessary for us to decide on this appeal whether defendant's exercise of its surface rights was reasonable or unreasonable, or whether it constituted a trespass, since, for the reasons stated below, we find: (1) that assuming it was a trespass, it was not willful, and (2) that the measure of damages for the displacement of the coal would be the same whether such displacement was caused by (a) a reasonable exercise of defendant's rights, or (b) by an innocent trespass.

1. *The Question of Willfulness.* The leading Virginia case on this question is *Wood* v. *Weaver,* 121 Va. 250, 92 S. E. 1001, in which the court said:

> "On the question as to when a trespass is willful, the decisions are almost innumerable. They develop, however, certain well settled conclusions. Willful, in this connection, is not confined in its meaning to the act of trespass itself, in the sense that such act itself is intentionally or knowingly done. In that sense every trespass would be willful. The legal meaning of the word willful in this connection is a technical one, which the courts and text writers have found it impossible to define in set terms which will fit every case. To be willful the act of trespass itself must be intentional, to be sure, for if done accidentally or by inadvertence or by mistake not induced by gross negligence, it will not be willful. (citing cases) • • • But a criminal intent is not essential, nor even a fraudulent intent. The act need not rise above the degree of gross negligence of the property rights of others to constitute the trespass a willful trespass. (citing cases) • • •
>
> "To be more specific. The trespass must be committed under a *bona fide* claim of right, or title, not induced by gross negligence in failure of the trespasser to ascertain the correct location of the property, or the title to it, otherwise it is willful; and, conversely, if it be in truth committed under such

claim of right or title, not induced as aforesaid, it is not willful. (citing cases)."

See also *French* v. *Stange Mining Co.*, 133 Va. 602, 114 S. E. 121, and *Pan Coal Co.* v. *Garland Pocahontas Coal Co.*, 97 W. Va. 368, 125 S. E. 226, where the court said: "• • • to be a wilful trespasser one must not only intentionally commit the act of trespass, but must do so under such circumstances as would warrant the court or jury in finding that he did it in bad faith." The court cited many illustrative cases, including *U. S.* v. *Homestake Mining Co.*, (8 Cir.) 117 Fed. 481, in which Judge Sanborn said:

> "If either or both these presumptions make every trespasser a willful and intentional wrongdoer, because he is chargeable with knowledge of the law, then there never has been, and never can be, a trespasser through inadvertence or mistake, or one who violates the law in the honest belief that he is acting within his legal rights; and the rule that the damages caused by such a trespasser should be limited to the value of the wood or timber in the tree or of the ore in its bed, which was announced in *Bolles Wooden-Ware Co.* v. *United States*, 106 U. S. 433, 434, 27 L. Ed. 230, and which has been reiterated and applied in numerous cases since, is *functus officio* and useless, because no class or party to which it is applicable can ever be. The truth is, however, that this rule, and every other rule which measures the damages caused by trespassers, does not call the righteous, but sinners to restitution. None of these rules have any application to those who do not violate the law. Every trespasser breaks the law, and to every trespasser the maxim applies that every man knows the law. Notwithstanding all this, the law in its wisdom, perceives the marked difference between the heinousness of the offenses of those who recklessly, or with actual intent to rob others of their rights, trespass upon their property, and of those who trespass by mis-

> take, and with no evil purpose, no actual, wilful intent to commit a wrong; and it declares that the former class shall pay to their victims the full value of the lumber or the ore they take at the time they sell or use it, while the latter shall be relieved from liability upon restitution of the value of the timber in the trees or of the value of the ore in the mine."

In the case at bar Judge Barksdale made the following finding: "I find that Clinchfield in displacing the five thousand four hundred fifty-four (5,454) tons, acted in good faith. It believed in good faith that it was within its rights as owner of the surface estate in making the excavations, and further believed in good faith that the coal displaced had no market value." We agree with this finding. Even if the displacement of the coal be deemed a trespass, and not within the reasonable exercise of defendant's residual or surface rights, the trespass was not willful.

2. *The Measure of Damages.* It is established law in Virginia and elsewhere that where the removal or displacement of the coal is done innocently and in good faith, compensatory damages only can be recovered, and that such damages should be based on the value of the coal in place, in other words, its royalty value. *Douthat* v. *C. & O. Ry Co.*, 182 Va. 811, 30 S. E. 2d 578; *French* v. *Stange Mining Co.*, 133 Va. 602, 114 S. E. 121; *Wood* v. *Weaver*, 121 Va. 250, 92 S. E. 1001; *Pan Coal Co.* v. *Garland Pocahontas Coal Co.*, 97 W. Va. 368, 125 S. E. 226; *U. S.* v. *Wyoming*, 331 U. S. 400, 91 L. Ed. 1590, 67 S. Ct. 1319, rehearing denied, 332 U. S. 787, 92 L. Ed. 370, 68 S. Ct. 37.

It is only where the trespass is willful that a higher measure of damages may be allowed. *Wood* v. *Weaver, supra; French* v. *Stange Mining Co., supra; Pan Coal Co.* v. *Garland Pocahontas Coal Co., supra; U. S.* v. *Wyoming, supra; Pine River Logging Co.* v. *U. S.*, 186 U. S. 279, 22 S. Ct. 920, 46 L. Ed. 1164; *Trustees of Dartmouth*

*College* v. *International Paper Co.*, 132 Fed. 92; 4 Restatement of the Law of Torts, 663-664; 1 *Am. Jur.*, Accession, secs. 25-26. The reason for this distinction was well stated by Judge Sanborn in the passage quoted above from *U. S.* v. *Homestake Mining Co.*

Since we have held that even if the displacement of the coal by defendant in the case at bar be deemed a trespass such trespass was not willful, it follows that plaintiff was entitled to no more than the value of the coal in place, which the district court awarded to her. If the displacement of the coal was within the reasonable exercise of defendant's rights and not a trespass at all, her damages could not be higher.

Defendant contended in the district court that the displaced outcrop coal was unmineable and had no value in place, but was really carboniferous material, so mixed with soil and other impurities that defendant was entitled to treat it as "just soil", in the same way that defendant treated the similar material on its side of the property line without any obligation to pay anything on the mineral. But the district judge ruled against defendant on this point, and defendant took no appeal; so defendant's point is not before us.

Plaintiff also complains because she was not allowed interest on the value of her coal computed from the dates when it was displaced by defendant. This was a matter in the discretion of the trial judge, and under all of the circumstances of the case, we do not think he abused his discretion. Code of Virginia, 1950, secs. 8-223; *Wolford* v. *Williams*, 195 Va. 489, 78 S. E. 2d 660; *Jones* v. *Foster*, (4 Cir.) 70 F. 2d 201. Cf. *C. & O. Ry. Co.* v. *Elk Refining Co.*, (4 Cir.) 186 F. 2d 30, where the circumstances were quite different.

*Affirmed.*

## Judgment of the Court of Appeals, Fourth Circuit.

Filed and Entered November 18, 1955.

UNITED STATES COURT OF APPEALS,

FOR THE FOURTH CIRCUIT.

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No. 7046.

---

MARJORIE A. MULLINS,

Appellant,

*vs.*

CLINCHFIELD COAL CORPORATION,

Appellee.

---

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.*

---

THIS CAUSE came on to be heard from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

November 18, 1955.

MORRIS A. SOPER,
United States Circuit Judge.

## Order Denying Petition for a Rehearing.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT.

No. 7046.

MARJORIE A. MULLINS,

Appellant,

*vs.*

CLINCHFIELD COAL CORPORATION,

Appellee.

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT ABINGDON.*

This Court having at its November term, 1955, rendered its decision affirming the judgment of the said District Court appealed from in this cause, and the appellant having on December 19, 1955, filed a petition for a rehearing of the said cause, and the same having been carefully considered,

It is now here ordered by this Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of five days.

January 4, 1956.

MORRIS A. SOPER,
United States Circuit Judge.

A true copy,

Teste:

RICHARD M. F. WILLIAMS, JR., Clerk,
U. S. Court of Appeals for the
Fourth Circuit.

## Order Extending Time to File Petition for Writ of Certiorari.

SUPREME COURT OF THE UNITED STATES.

No. , October Term, 1955.

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MARJORIE A. MULLINS,

Petitioner,

*vs.*

CLINCHFIELD COAL CORPORATION.

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UPON CONSIDERATION of the application of petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 3rd, 1956.

/s/ EARL WARREN,
Chief Justice of the United States.

Dated this 3rd day of April, 1956.

## Deed, Dated November 22, 1944, V. F. Bond, et ux to Marjorie A. Mullins to all the Coal and Mineral Rights.

V. F. Bond *et ux*

To Deed

Marjorie A. Mullins

This Deed made this 22nd day of November, 1944, by and between V. F. Bond, and Audrey A. Bond, his wife, parties of the first part; and Marjorie A. Mullins, party of the second part;

Witnesseth: That the said parties of the first part in consideration of the sum of Ten Dollars and other good and valuable consideration to them cash in hand paid by the party of the second part, receipt whereof is hereby acknowledged, do hereby grant, bargain, and sell, and convey, with General Warranty, unto said party of the second part, all of the Coal, gas, oil and mineral rights in and under that tract of land, located in Wise County, Virginia, which tract of land is more particularly bounded and described as follows:

Beginning on a white oak, gum and dogwood, on top of fork ridge, N. 38° 30′ E. 473 feet to a chestnut oak and water oak on a cliff, thence N. 80° 30′ E. 295 feet to two chestnut oaks; thence S. 69° 30′ E. 187 feet to three dogwoods, thence N. 69° E. 104 feet to a hickory and black oak; thence leaving the top of the ridge N. 8° 15′ W. 1357 feet, crossing the creek, to two white oak stumps; thence N. 53° 07′ W. 646 feet to a white oak and dogwood on a point; thence N. 49° 47′ W. 1293 feet to a black oak and water oak on the dividing ridge between Bold Camp and Mill Creek thence S. 18° 25′ W. 525 feet to a chestnut; thence S. 41° 15′ W. 1270 feet to a hickory, two small maples and a black oak, and thence S. 51° 10′ E. 2430 feet to the Beginning containing 96.5 acres, more or less, being the same property

conveyed by R. L. Hillman, and wife by deed dated October 29, 1936, to said V. F. Bond.

It is expressly understood between the parties hereto that this conveyance deals only with the mineral rights, and that the title to the land or surface is to remain in the grantors, their heirs or assigns, grantee shall have the right to dig, mine, excavate, drill, prepare for market and remove or carry away the said coal, gas, oil and minerals without liability for damages to the surface or anything thereon, nor shall grantee be liable for damages for sinking of any water on said land; with right of ingress and egress for purpose of exercising their mining rights hereunder.

Witness the following signatures and seals.

V. F. Bond (Seal)
Audrey A. Bond (Seal)

Commonwealth of Virginia, City of Alexandria, to-wit:

I, the undersigned Notary Public, in and for the State and City aforesaid, do hereby certify that V. F. Bond and Audrey A. Bond, his wife, whose names are signed to the above Deed bearing date on the 22nd day of November, 1944, have acknowledged the same before me in my City aforesaid. My commission expires May 13th, 1947.

Given under my hand this 22nd day of November, 1944.

Mary Ann Robert
Notary Public

Virginia: County of Wise, To-wit:

In the Clerk's Office of said County the 15th day of December, 1944, at 1:45 o'clock P. M., the foregoing writing Being properly stamped, was admitted to record and recorded the 19th day of December, 1944, in Deed Book 254, page 3, etc.

Teste: J. A. Gardner, Clerk
by Allene Henley, D. C.

VIRGINIA: WISE COUNTY, To-wit:

I, Allene H. Smith, a Deputy for W. B. Lay, Clerk, of the Circuit Court of Wise County in the aforesaid Commonwealth do hereby certify the foregoing to be a true copy of the deed from V. F. Bond et ux to Marjorie A. Mullins, dated Nov. 22, 1944 and recorded in Deed Book No. 254 page 3, etc.

Given under my hand this 1 day of August, 1955.

By ALLENE H. SMITH, D. C.

## Deed Dated May 3, 1945 From V. F. Bond, to Clinchfield Coal Corporation Conveying Surface Subject to Mineral Rights.

14285

V. F. Bond, et ux

DEED

Clinchfield Coal Corporation

This Deed made this 3rd day of May, 1945 by and between V. F. Bond and Audrey A. Bond, his wife, grantors, hereinafter called Bonds, and Clinchfield Coal Corporation, a corporation, organized and existing under the laws of the Commonwealth of Virginia, Grantee, hereinafter called Clinchfield;

WITNESSETH:

That for and in consideration of Two Thousand Five Hundred ($2,500.00) Dollars, cash in hand paid, receipt of which is hereby acknowledged, Bonds do hereby grant, bargain, sell and convey to Clinchfield, with general warranty (subject to the exception and reservation hereinafter set forth), that certain tract or parcel of land situated on the waters of Bold Camp Creek in Roberson Magisterial District of Wise County, Virginia, and more particularly bounded and described as follows, to-wit:

Beginning on a white oak, gum and dogwood, on top of Fork Ridge, running thence N 38 E 473 feet to a chestnut oak and water oak on a cliff; thence N 80 30 E 295 feet to two chestnut-oaks; thence S 69 30 E 187 feet to three dogwoods; thence N 69 E 104 feet to a hickory and black oak; thence leaving the top of the ridge N 8 15 W 1357 feet crossing the creek to two white oak stumps; thence N 53 7 W 646 feet to a white oak and dogwood on a point; thence N 49 47 W 1293 feet to a black oak and water oak on the dividing ridge between Bold Camp and Mill Creek; thence S 18 28 W 525 feet to a chestnut; thence S 41 15 W 1270

feet to a hickory, two small maples and a black oak; thence S 51 10 E 2430 feet to the BEGINNING, containing 96.50 acres, more or less. Being the same tract or parcel of land that was conveyed to said V. F. Bond, by R. L. Hillman and Edith A. Hillman, his wife, by deed dated October 29, 1936, and of record in the Clerk's Office of said County in Deed Book 223, page 194, to which deed so of record, reference is here made.

Excepting and reserving, however, from this conveyance a lot or parcel of land situated in Mill Creek Gap, containing about 1 acre, and bounded and described as follows, to-wit:

Beginning at a stake on the bank in edge of the State Highway at a fence corner, which point is 35 feet from the center of the State Highway in Mill Creek Gap and on the northern line of the Boatwright Bond Tract of land; thence running in a southeastly direction, with the westerly right of way line of the State Highway a distance of 400 feet to a stake in said right of way line; thence S 41 30 W 100 feet to a stake on a hillside; thence running a parallel line with the right of way line of the said State Highway 400 feet to a stake on a hillside; in a line of the said Boatwright Bond tract of land, and thence with a part of the line of same 100 feet to the Beginning.

The tract or parcel hereby conveyed containing a net acreage of 95.5 acres, more or less, but this is a sale by the boundary and not by the acre.

There is excepted from this conveyance all the coals, minerals and mining rights which have heretofore been conveyed by deeds duly of record by the grantors, predecessors in title, and subject to any recorded right of way easement in favor of Appalachian Electric Power Company.

Bonds covenant that Clinchfield shall have quiet possession of said land, subject only to the exception and reservation hereinbefore made, free from encumbrances.

Witness the following signatures and seals.

AUDREY A. BOND (SEAL)

V. F. BOND (SEAL)

State of Virginia, County of Arlington, to-wit:

I, Nathan A. Metro, a Notary Public in and for the County of Arlington, aforesaid, in the State of Virginia, do hereby certify that V. F. Bond and Audrey A. Bond, his wife, whose names are signed to the writing above bearing date on the 3rd day of May, 1945, have this day acknowledged the same before me in my County aforesaid.

My commission expires February 22, 1949.

Given under my hand this 9 day of May, 1945.

NATHAN A. METRO,
Notary Public.

(Nathan A. Metro,
Notary Public,
Arlington Co., Va.)

VIRGINIA: County of Wise, To-wit:

In the Clerk's Office of said County the 15th day of June, 1945 at 2:50 o'clock P. M. the foregoing writing Being properly stamped was admitted to record and recorded the 16th day of June, 1945, in Deed Book 257 page 203, etc.

Teste: J. A. GARDNER,
Clerk.

By ALLENE HENLEY,
D. C.

VIRGINIA: WISE COUNTY, To-wit:

I, W. B. Lay, Clerk of the Circuit Court of Wise County in the aforesaid Commonwealth do hereby certify the foregoing to be a true copy of the deed from V. F. Bond, et al to Clinchfield Coal Corporation, dated May 3, 1945 and which deed was recorded 15th day of June, 1945 in Deed Book 257 page 203.

Given under my hand this the 12 day of April, 1956.

W. B. LAY,
Clerk.

By ALLENE H. SMITH,
Deputy Clerk.

(SEAL)

**Letters From Hunton, Williams, Anderson, Gay & Moore to Mrs. Roy Mullins Dated December 21, 1951 and December 31, 1951 Concerning Order for More Definite Statement.**

Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE

File No. 11,609

December 21, 1951

*Re:* Marjorie A. Mullins *v.* Clinchfield Coal Corporation and C. & O. Railway Co.

Mrs. ROY L. MULLINS
15 Fourth Street,
Frenchtown, New Jersey

Dear Mrs. Mullins:

I enclose copy of an order which we have today received from Judge Barksdale, which in effect directs you to supply substantially all of the information demanded by the defendants on their motions to make our bill of complaint more definite. I am very sorry that the Judge has disposed of this matter in this manner, as I think he is clearly wrong.

The order is not appealable, however, unless it can be said to be an abuse of judicial discretion, which in some respects at least it seems to me to be. Mr. Robertson and I will give consideration to this aspect of the matter and let you have a further expression of our views.

To illustrate what I mean, you will note that the first and second "particulars" which you are required to supply have to do with whether or not you have any present intention of mining and removing coal from the premises, and if so you are required to state in a general way your plan in that respect.

I do not think either of these factors are relevant to an adjudication of your rights. They ignore completely what I think is a very substantial element of value, and that is the right to sell and dispose of your property, irrespective of any present intention on your part to mine or remove coal. If it is true that the defendants' installations interfere with what would be the normal and natural manner of mining and removing coal from the property it is obvious that its sales value to you is either destroyed or greatly diminished, and it should not, therefore, be necessary, in order for you to recover in this proceeding, to have or to show any present intention of improving the property.

I think Judge Barksdale has clearly overlooked this important factor, and unless we can sustain a right of appeal on the grounds that he has abused his discretion, I am disposed to ask him to rehear certainly some parts of his order.

I extend to you and Dr. Mullins the compliments of the season, and beg to remain,

Sincerely yours,

THOMAS B. GAY

12-10
Enclosure

Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE

File No. 11,609

December 31, 1951

*Re:* Marjorie A. Mullins *v.* Clinchfield Coal Corporation et als.

MRS. ROY L. MULLINS
15 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

I refer to my letter of December 21st and beg to advise that after a critical consideration of the Federal Rules of Civil Procedure and the pertinent decisions of the federal courts, Mrs. Robertson and I have concluded that Judge Barksdale's order of December 19th is not appealable at this time, although I think some of the matters about which he has required you to make a more specific statement of your claim clearly involve an abuse of judicial discretion.

The cases make it quite plain that a review of the order can not be had upon an immediate appeal, but must await a trial of the case and be considered as a part of any general appeal that might be taken by either party from the final judgment of the district court. I am, however, seriously considering asking Judge Barksdale to rehear his decision for the reasons mentioned, among others, in my letter to you of December 21, 1951, and I will advise you further in this respect at an early date.

In the meantime, I think you should provide us with a factual statement of your own views in respect to each of the six items about which the order directs you to make more specific allegations of the complaint. I am sending a copy of the order by today's mail, together with copy of

this letter, to Mr. Evans with the request that he let us have a statement of such facts as he thinks may be properly stated in answer to items 3 to 6, inclusive, of the order.

You will have noted that it directs us to make response within a reasonable time, and I think thirty days may fairly be said to be such period, so that we should be prepared to file such a statement, I would say, on or about the 15th, provided we have not in the meantime obtained an order for a rehearing. Awaiting your early reply, I beg to remain,

Sincerely yours,

THOMAS B. GAY

12-10
cc—Mr. Evans

**Letter Dated October 15, 1953 From Hunton, Williams, Anderson, Gay & Moore to Mrs. Roy Mullins Concerning Argument at Abingdon, Virginia October 13, 1953.**

Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE

File No. 11,609

October 15, 1953

*Re:* Marjorie A. Mullins *v.* Clinchfield Coal Corporation and Chesapeake and Ohio Railway Company

MRS. ROY L. MULLINS
15 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

Mr. Robertson and I flew to the Tri-City Airport in Tennessee last Monday afternoon and, after spending the night in Abingdon, participated in the hearing in the above matter on Tuesday.

The court convened at 9:30 and, with the exception of an hour for luncheon, the hearings continued until about five o'clock in the afternoon. The argument took a wide range and much was said by counsel on both sides which I did not think had any particular bearing on the issues immediately before the court, and which certainly was not supported by any proof or pleading in the form of affidavits then before the court.

To the extent that I participated in this aspect of the matter I was undertaking to reply to or rebut statements of fact or inferences which defendants' counsel sought to draw from our affidavits which I did not believe to be true. I had

received your very excellent telegram concerning the C. & O.'s failure to provide you with a plan for side track facilities, but as this phase of the matter was not developed during the course of the argument, I felt it unnecessary to make use of it.

Judge Barksdale asked me shortly after I began my argument in reply to what had been said by Mr. Stuart and Mr. Greear, whether I though his prior order requiring you to file a more particular statement was in error. I think he was prompted to ask me this by the statement which Mr. Stuart had made, to the effect that your more particular statement had been so prepared as to permit, if not in fact provoke, such an argument. I therefore replied to Judge Barksdale's question by saying that while the more particular statement had not been prepared with any such purpose, I felt justified, in view of Mr. Stuart's statements and of the Court's inquiry, to say quite frankly, but with much deference, that I did think the prior order erroneous. I then proceeded to point out what in my opinion was the legal sufficiency of the claim stated in paragraph 11 of the complaint, and pointed out that an answer by the defendants denying those averments would have put the case at issue and permitted the parties to go to trial. I believe I detected through the argument some indication on Judge Barksdale's part that I had made a favorable impression upon him on this point.

Judge Barksdale asked me whether, if he were of opinion that our more definite statement did not in all respects comply with his order, the entry of a further order requiring you to make that more definite statement more specific would or could be complied with. I replied by saying that in the light of your present engineering advices which were to the effect that the site selected by Clinchfield for its tipple was the best and most economical location for you to employ, you could not prepare or submit plans which would not relate themselves to this particular location and that, as your more particular statement points out, the decision of that question by the Court would necessarily control your future actions. That is, if it be first determined that you

were not entitled to occupy the present Clinchfield location, you would of course have to and in fact desire to submit plans with reference to some other location, but that I did not feel you should, as a matter of law, be required to take such a course in view of the unequivocal opinion of your engineer, which was not controverted at the hearing, that the most feasible and economic location for you to use was that now occupied by Clinchfield—that this was a showing on your part that they had unreasonably pre-empted the use of the surface in derogation of your rights. I did not get any specific reaction from Judge Barksdale on this aspect of the matter.

In concluding my principal argument, I called attention to the averments of paragraph 10 of the complaint that the defendants had stripped and taken away large and valuable coal deposits belonging to you, and called attention to the constant use by Clinchfield, as appears from the Evans affidavit, of the space thus made available for Clinchfield's tramtracks in the transportation of its coal, and argued that this was a continuing trespass upon your property rights.

I relied upon and quoted extensively from the *Clayborn* and *Raven Red Ash Coal Co.* cases in support of this aspect of my argument. I think it made considerable impression upon Judge Barksdale, for the reason that when Mr. Stuart undertook to reply he asked him the direct question why paragraph 10 of the complaint did not state a cause of action. Mr. Stuart undertook to reply to this, as did Mr. Greear, by saying that the coal which had been stripped was only outcrop coal, negligible in amount and of no consequential value, and that the cases to which I referred dealt with the property rights of a surface owner and not those of a mineral owner.

It is difficult for me, if I were otherwise disposed to do so, to make any prediction as to just what Judge Barksdale will do. I am inclined to the view, however, that he will overrule the defendants' motion to dismiss the complaint for failure to state a claim, and also overrule the plaintiff's

motion for summary judgment on the pleadings. What he will do on the defendants' motion to strike our more particular statement as not responsive to his prior order, I am frank to say I do not have any clear idea. I do not believe he will take the drastic action urged upon him by defendants' counsel and hold that, because it is irresponsive, the complaint is therefore insufficient and should be dismissed, and I incline to the view that he will either hold it sufficient, thereby accepting my argument that it should never have been required in the first instance, or require you to file a more definite and complete plan.

At the conclusion of the argument I handed the Court a brief memorandum of law referring to the cases upon which I had relied, and he stated that he would receive a further memorandum from me, or from defendants' counsel, in respect to the matter at any time within the next ten days. I have no present intention of filing such a memorandum as I have cited all the cases I think presently essential. If the defendants file a memorandum relying upon authorities that I do not think pertinent or are distinguishable, I will file a reply.

I do not think we can reasonably expect any action by the Court sooner than thirty days.

Sincerely yours,

12-10 THOMAS B. GAY.

**Letters Dated January 19, 1955, January 31, 1955 and February 22, 1955 From Hunton, Williams, Gay, Moore & Powell to Mrs. Roy Mullins Advising Against Appeal and Urging Sale of Minerals to Clinchfield Coal Corporation.**

Letterhead of

HUNTON, WILLIAMS, GAY, MOORE & POWELL

January 19, 1955

File No. 11,609

*Re:* Mullins *v.* Clinchfield

Mrs. ROY L. MULLINS
15 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

I have now had the opportunity to read and carefully consider the opinion of Judge Barksdale. In brief outline his holdings are as follows:

1. The plaintiff is entitled to recover for the value of coal removed by the defendant.
   (a) The measure of damages is only the royalty value (25¢ per ton) and not the market value of extracted coal because the defendant's trespass was not wilful but in the good faith belief that the material was valueless.
   (b) The defendant's evidence of quantity of coal removed is more reliable than that of the plaintiff.
2. Matter of balance of convenience not reached.

3. Not sufficient evidence to support defenses of laches and estoppel.

4. There is minable coal on the property in quantities to justify a mining operation, although no opinion was expressed as to whether plaintiff could do so at a profit.

   (a) Not necessary to find where this minable coal is located or in what quantities.

   (b) Admittedly there is nothing to interfere with mining operations on the north slope or on the west side of the south slope.

   (c) If plaintiff desires to mine at east end of south slope it is entirely practicable for her to do so and though this might require removal of some of defendant's structures there, this would not involve any great difficulty.

   (d) But there is no sufficient evidence that she presently desires to mine there or that the defendant has refused to permit this. Her evidence in this respect is not sufficiently definite to justify an injunction.

5. The crucial finding is that plaintiff has never at any time had a present *bona fide* intention to mine her coal and that therefore she is not entitled to an injunction.

   (a) Negotiations with C&O not in good faith.

   (b) Plaintiff's testimony or correspondence that she could "break the Clinchfield" by leasing to four lessees along the east portion.

   (c) Plaintiff's statement that a settlement should be based upon the cost of Clinchfield being compelled to remove its facilities.

On the first point, I think the evidence fully supports the Court's finding that the defendant had no conscious

purpose to injure the plaintiff since all the defendant's testimony was that the material which they removed was valueless to you. Accordingly, the Court was justified in computing damages at the royalty rate. The defendant's evidence of the careful method it employed in estimating the quantity of coal removed is certainly as believable and likely to be more accurate than the estimate which Mr. Fitzgerald gave on the basis of the visual observations which he and Mr. Hamilton made. While there is some dispute as to the length of the area from which coal was removed, I do not think it can be argued with success that the defendant's estimates of quantity are less accurate than plaintiff's.

The second and third points need no comment.

On the fourth point it seems that the Court has found that there is sufficient minable coal on the tract to justify your undertaking a mining operation, but, as I read the opinion, it does not appear to decide as a matter of law that you may mine the coal at *any particular location*. In stating that, as a factual matter, you can now mine on the north slope and on the west side of the south slope and, with some rearrangement of defendant's facilities, on the east side of the south slope, I believe the Court was only justifying its holding that you are not entitled to an injunction at this time. The Court's opinion does not appear to amount to *an unqualified holding* that you may mine at any point on the property and, if you attempt to do so, you may be met with a suit by Clinchfield, asserting that your use of the surface at some particular point is unreasonable and unnecessary. If you *now* desire to mine at the east side of the south slope, you should have plans prepared describing your proposed operations, make them known to Clinchfield, and endeavor to secure its assent.

The fifth point deals with what the Court characterized as the crucial finding justifying its view that you are not entitled to an injunction, i.e., your lack of a *present bona fide* purpose or intent to mine the property. In the absence of such an intent, you are obviously not entitled to present relief, since *until* you have such an intent you have not been

injured. This is a factual finding based principally, if not solely, upon your prior conduct and assertions. I cannot help but feel that the Court's finding in this regard is fully supported by the evidence, and that there is no adequate evidence to overcome defendant's proof in this regard.

Furthermore, since the Court had already found that as a factual matter you could mine the property if you seriously wished to do so, there was no reason for the allowance of damages for coal claimed to have been rendered unminable by reason of Clinchfield's occupancy of the surface. The Court made no specific finding as to punitive damages, but since it found that, in removing your coal, Clinchfield had been guilty of no wilful misconduct, it is clear that punitive damages were not recoverable.

Frankness requires me to say that *there is sufficient evidence* to justify each of the Court's factual findings and since these findings, if correct, justify the legal conclusions he has reached, I am of opinion that there is no basis upon which the case could be appealed with any reasonable likelihood of reversal.

The foregoing result, while most regrettable to me, is not surprising, for the reasons that I many times pointed out to you during our preparation for trial. With the knowledge of my views as to the possibility, even probability, of the outcome of the case, I cannot understand how you and Dr. Mullins could have been willing to stake your financial security on the outcome, and now have to face the distressing financial results which you describe.

I do not feel at liberty to request Mr. Fitzgerald to prepare what you speak of as "a very simple plan to open the Third Bench, or the B Bench" with the view of loading the coal into trucks at the portal, thereby eliminating the necessity of a chute, etc. As an engineer, Mr. Fitzgerald and his company would want to have their plans accurate and coordinated with the topography of the land and other local conditions, which would no doubt require a further visit to the premises. This seems to me to be asking more of him and his company than you reasonably have the right to expect, although if you feel otherwise I do not

wish you to consider what I have said as deterring you from doing so.

I think the greatest service anyone, lawyer or layman, can render you under the circumstances is to devise some means whereby you can dispose of your holdings in the Upper and Lower Bond tracts, and possibly the Hutchinson tract, for a sum sufficient to reimburse you, in part at least, for the costs you have incurred in endeavoring to obtain a favorable decision as to your rights.

Clinchfield once offered you $21,000.00 on the basis of 15 cents per ton royalty. If they would presently increase this to 25 cents per ton and apply it to the same quantity of coal as they used in making their prior offer, I would strongly advise you to settle the matter on that basis. I of course have no knowledge as to what Clinchfield's reaction would be to such a proposal, but I might advise Mr. Stuart that you had requested my opinion upon the advisability of an appeal and that, in considering that question, I would want to do so in the light of a possible settlement of the matter along the lines mentioned. Please advise me if you and Dr. Mullins are willing to have me make such an inquiry of Mr. Stuart.

Please substitute the enclosed pages 91 and 91A for page 91 of the copy of Clinchfield's brief which I gave you after the argument. Mr. Stuart handed them to us the night before for this purpose.

In view of the time and interest which both Mr. Evans and Mr. Fitzgerald manifested in the litigation, I have thought it courteous to send both of them a copy of Judge Barksdale's opinion with a covering letter, a copy of which I enclose. If you should decide to pursue the matter further with either of them, a knowledge on their part of what the Court said may pave the way for any request you might care to make of them for further assistance.

Sincerely yours,

THOMAS B. GAY

12-10
Enclosures

Letterhead of

HUNTON, WILLIAMS, GAY, MOORE & POWELL

January 31, 1955

File No. 11609

*Re:* Mullins *v.* Clinchfield

MRS. ROY L. MULLINS
15 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

I have read with care your three letters of January 22nd, 25th and 26th, 1955. Completely aside from their contents, I am disturbed by the tone of these letters.

I realize you are extremely disappointed in the outcome of the case, but I thought that prior to the trial you had become reconciled to the possibility of an adverse decision and had resolved to accept the judgment of the Court as a satisfactory and final adjudication of your rights, unless there was error justifying an appeal. Your three letters make it quite clear to me that you do not intend to end your dispute with Clinchfield.

In my letter of January 19, 1955, I think I made it plain that in my judgment there is no basis upon which the case can be appealed with any reasonable hope of reversal. I did not tell you in that letter, and I had hoped that it would not be necessary for me to say so, but, frankly, if you do determine to take an appeal I could not, consistent with the foregoing opinion, represent you in the matter. When an attorney signs any pleading or petition he impliedly represents to the Court that in his opinion there are grounds to support it. I am unhappily unable to put myself in that position in respect to any appeal that might be prosecuted in this matter. Moreover, a sense of professional responsibility to the Court of Appeals and my regard for the value of its time would

make me unwilling to impose upon it the burden of reviewing the extensive record in this case, reading the briefs, hearing argument and writing a formal opinion, where there is in fact no substantial basis for appeal.

I was impressed, and I thought you were, with the fairness and attentiveness of Judge Barksdale throughout the trial at Abingdon. At the argument in Roanoke it developed he had read much of the transcript and carefully considered the briefs. Under these circumstances I do not think you can fairly complain that you did not receive a just and impartial trial, or doubt that the Court's decision was the result of anything less than the conscientious conviction of an able and experienced jurist, that your claim was not meritorious.

Because I believe you have had a fair trial, free from reversible error, and because I am convinced that hereafter you must tailor the pattern of your plans for the Upper Bond coal to fit the Court's decision, I sincerely hope that you will try to forget the disappointment which you now feel and resolve to amend your ideas of the nature and extent of your rights on the Upper Bond Tract so that they may more nearly conform to the Court's decision. With your thinking thus composed, you may wish to give further consideration to your present plans to mine this coal.

One thing made certain by the evidence at the trial was that there is very little coal on the Upper Bond Tract which can be mined today with any likelihood of a profit. We did not introduce it in evidence, but you will recall that the Mott Drill Company reported that, on the north slope where most of your coal lies in only a 38" seam, the cover over the "A" bench is soft fire clay. From the testimony of experts it would not seem that under such a roof you could possibly mine this coal and hope to make a profit. Someday, when the demand is greater and the better deposits are exhausted, this may not be true and perhaps you would be justified in undertaking the venture.

On the south slope, where the coal is thicker and probably you would find better top conditions, the acreage

is so small that both Mr. Evans and Mr. Fitzgerald were of opinion that only the simplest facilities could be used with any hope of paying for the necessary equipment, your labor costs and leave a profit when all the coal was extracted. Under these circumstances I think you might very wisely determine to postpone your operations there until there is a substantial improvement in the coal market.

If you are determined to mine that coal now I cannot tell you where your opening should be. But I do think I should caution you against relying too heavily on the argument we made that you should open near the east boundary line. In making that argument we were advocates, not engineers. *Since that was the only location where you would encounter significant interference,* we undertook to demonstrate *why* it was desirable for you to enter there. But this was only a demonstration based entirely on elevations which may or may not have been properly interpreted. I do not *know* what dip you will find under the south slope and neither does anyone else. To discover this you will need to employ an engineer who can make core drills and surveys which will disclose this vital fact. Moreover, the Court might, if Clinchfield interposed objection to your entry at this point, then hold that to do so would be unreasonable *at this time* in view of the testimony in respect to your present ability to mine the north slope, or the west end of the south slope.

I do not think it would serve any useful purpose for me to attempt to comment on all the various facts and arguments which you have discussed in your three letters. In large part they go to the question of whether the Judge's decision was right, and since that decision has now been rendered I think these questions are moot, unless there was error sufficient to justify an appeal. Since I am convinced there was not, to give further consideration to these questions would, to me, be a useless consumption of time.

One point you have made seems to give you great encouragement and I will comment on it briefly. You seem to feel that you are somehow the *owner* of the space formerly occupied by the coal which Clinchfield improperly removed

and suggest that for this reason you may now require Clinchfield to vacate this space.

I believe you must have gotten this impression from the argument I advanced in the memorandum of November 13, 1953, which I filed in opposition to Clinchfield's motion to dismiss the complaint for failure to state a claim upon which relief could be granted. The argument, which appears at page 29 of the memorandum, was offered in support of the assertion that regardless of whether we had properly complied with the order for a more particular statement (of your mining plan) you were in any event entitled to damages on account of Clinchfield's use of the Upper Bond Tract. My point was that unless required to pay damages for removing your coal and laying its tram tracks where the coal had been, Clinchfield would be benefitting from its own trespass. I was not there claiming that you had any *ownership* of this space which, *apart from any mining operation,* would permit you to require that Clinchfield remove its facilities. On the contrary, I do not believe you have any such right.

It is true that a mineral owner has the right to use the space formerly occupied by coal which he has already mined as a means of access to the balance of the coal on the tract; but the Virginia cases clearly hold that this right is in the nature of an *easement* which can *only* be exercised by the coal owner in the course of mining the coal on the tract involved and that he has no *title* or *ownership* of the space, or of the containing shell, giving rise to rights which can be asserted independent of any mining operation.

Since, however, the Court has decided that you have never had any present *bona fide* intention to mine this coal, it accordingly held that you had no present need for the surface or any other area of the Bond Tract. Until you can demonstrate such a need in a convincing manner, I do not believe you would succeed in an effort to exclude Clinchfield from this space.

If you undertake to mine this coal and can then demonstrate a reasonable need for this space, you will undoubtedly have the right to occupy it with your facilities even

if this means excluding Clinchfield. Of course you have the same right as to any other space on the property, surface or otherwise.

You say that the greatest service I can render you is to enlist the immediate cooperation of Mr. Evans and Mr. Fitzgerald. As I wrote you, I very much regret I do not feel at liberty to do this. Of course you are completely free to solicit the assistance of these gentlemen, either for a fee, or free of charge. But now that the litigation is completed I do not think it proper for me to lend to your request whatever persuasive effect might flow from my professional relations with them. That would seem to me to be taking an unfair advantage of them. I believe that on reconsideration you will agree that the engineer you seek to employ should be free to accept or reject employment according to the merits of your proposal, or the probability that your undertaking will be successful. I shall be happy to make available to any engineer you select, for what value they may be to him, the copies of exhibits and other data I hold in my file.

The Court is now considering the findings of fact and conclusions of law submitted by Mr. Stuart, our comments thereon and those which we feel it appropriate for him to make in your behalf. As soon as they have been adopted by Judge Barksdale he will enter final judgment accordingly. Thereupon the time for appeal will commence to run and you will have thirty days within which to perfect your appeal if you desire to do so. If you do not do this within the time provided, your right to appeal will be lost.

When these findings of fact and the conclusions of law have been settled and a final judgment entered, I will feel that we have discharged our professional responsibility to you and that, although the result is an unhappy one, this litigation is concluded so far as we are concerned. I do wish, however, that I could somehow persuade you to adopt a more realistic view of the matter. You assured me in June that you would accept an adverse decision in a philosophic way, and at that time you seemed reconciled to the possibility of losing the case. That possibility has now

unfortunately become a reality and I feel certain your future peace of mind will depend largely upon your ability to accept this consequence and plan your activities concerning the Upper Bond coal in accordance with what the Court has said about your rights there.

If you are determined to mine, rather than dispose of your coal to Clinchfield, I think you should direct your attention to the many physical and economic problems which this will involve. If you can secure an operator willing to undertake the venture he may be able to work out with Clinchfield some plan for the joint use of the Bond Tract which will result in a minimum of interference to each party. But if Clinchfield remains convinced that your only purpose is to interfere with its activities, the result is bound to be disappointing to you, for as you must have observed Clinchfield is a determined antagonist fully capable of defending itself in a struggle for the economic advantages of its location on the Bond Tract.

I return the interesting clipping which you sent me.

Sincerely yours,

THOMAS B. GAY.

12-10
Enclosure

Letterhead of

HUNTON, WILLIAMS, GAY, MOORE & POWELL

February 22, 1955

*Re:* Marjorie A. Mullins *v.* Clinchfield Coal Corporation

MRS. ROY L. MULLINS
15 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

I have now had an opportunity to review your letters to me of February 5th and 14, 1955, received in my absence, and a memorandum of your telephone conversation with Mr. Buford on February 11, 1955. I want to comment on several of your observations.

I regret you are now convinced that my judgment and that of your engineers to seek an injunction without first having a plan of operation was "the distinct error that turned the case against" you. In the first place, I would have vastly preferred to try the case with a detailed plan for your operations or, better still, after you had actually attempted to mine the coal and failed because of Clinchfield's interference. That would have been the ideal position from which to have launched this case. Mr. Bolling told you as much as early as September 28, 1949, and Mr. Morris felt the same way. I frequently called your attention to the opinions of both of these gentlemen and told you I thought they were sound.

But there were a number of reasons why you could not place yourself in that position. You will acknowledge, I believe, that you could not have arranged *actually to mine* the property in 1951. The persons with whom you negotiated told you that you would first have to dispose of Clinchfield. This appears still to be true because of your

present inability to secure an operator willing to undertake this project.

And I am sure you will recall why we did not seek to prepare a detailed plan for your proposed mining operations. Both of the engineers assured us that because of Clinchfield's facilities there was no way for you to mine this coal in a practical or economical fashion. Moreover, to have laid out a plan which ignored Clinchfield's facilities before you knew whether the defendant would prevail on its defenses of bad faith, laches, and balance of convenience, would have been expensive and, as it developed, useless. Finally, as a result of Mr. Fitzgerald's examination of the tract it was apparent to both engineers that the quantity of coal available for mining could not possibly justify any except the simplest facilities. I was convinced that if you went into court describing the simple "gin-pit" installation which Mr. Fitzgerald said was all that was justified, you would seriously detract from the opinions which each engineer was prepared to express, namely, that no practical and economical plan could be devised which would not encounter interference from Clinchfield.

At the trial the defendant produced evidence which the Court found more persuasive than the opinions of our engineers and made a convincing case for the proposition that you *can* mine this coal, if you wish, without substantial interference from Clinchfield. It seems to me such evidence would have nullified whatever effect a proposed mining plan, prepared on the assumption that it was necessary for Clinchfield to remove some of its facilities, might have had.

Conceivably, evidence that you had actually drawn plans for some simple type of installation might have impressed the Court with the good faith of your present intentions to mine, but from its opinion I am satisfied the Court was convinced by what you said in your earlier correspondence with Mr. Stuart that you were not primarily interested in mining the coal, but that your real purpose was to compel Clinchfield to make an exorbitant settlement.

Therefore, even with the advantages of hindsight, I do not think it was poor judgment to proceed as we did without a detailed mining plan, nor do I believe that this procedure can fairly be pointed to as the reason for the adverse decision.

You ask that I explain why the Court did not believe the removal of your outcrop coal was intentional. I think you misunderstand. Of course Judge Barksdale realized the *removal* was intentional. Clinchfield never denied this. The defendant's position was that it did not *intentionally harm you;* it claimed to believe that the coal which it removed was valueless so that its removal did not injure you. When it was established that the coal had some value, the only issue was whether this value was so apparent that Clinchfield must have been aware of it and, in removing the coal, acted with a wilful intent to injure you. If so, your damages would be based on market value. But if the trespass was innocent and in good faith and the reasonable belief that the material removed was valueless to you, your measure of damages was only royalty value. The Court adopted the latter view of the matter, which was plainly supported by the testimony.

You rely upon the Court's statement that it would be "entirely practical" for you to enter from the east side to support your view that this is where you should mine. I do not think the Court intended to convey the idea that, from a *mining* standpoint this was the practical or desirable place for you to enter, but rather, that if you determined to enter there, the existing installations of Clinchfield in that area would not seriously prevent you from doing so.

I continue to be disturbed over the financial condition in which you have let the expenses of this case place you.

You certainly gave me to understand from the outset that you and Dr. Mullins were financially able to bear the expense of this litigation, and you never permitted me to suspect that you were being forced to the stringent economies described in your letter of February 14, 1955. Moreover, you have written on several occasions that you and Dr. Mullins had the necessary capital to mine this property.

On one occasion you told Mr. Evans you expected this would require about $200,000. Had I known your situation, I would certainly have recommended that you not stake your economic security upon the outcome of this litigation. I have warned you on a number of occasions of the possibility of an adverse decision and pointed out that the case would largely turn upon the view which the Court might take of your prior dealings with Clinchfield, as reflected in the correspondence and the testimony at the Bolling hearing, as well as upon the results of the engineering factors. I had assumed that your unwillingness to compromise the case early in the proceedings was the result of a conscious determination to risk the investment you have and that you had the financial ability to take this considered risk.

I am now considering the question of our further compensation and I will write you about this promptly.

In the meantime, I have advised Mr. Cantrall that it is entirely agreeable with us for him to undertake your further representation in this matter. Of course we will cooperate fully in supplying him with whatever factual information he may require in his consideration of the matter.

Sincerely yours,

THOMAS B. GAY

12-10

**Report Dated March 10, 1955 by Stathers & Cantrall Looking Toward Advisability of an Appeal or Reopening the Case of Marjorie A. Mullins *versus* Clinchfield Coal Corporation and Chesapeake & Ohio Railway Company.**

Law Offices

STATHERS & CANTRALL

March 10, 1955

MRS. ROY L. MULLINS,
305 Harrison Street,
Frenchtown, New Jersey.

Dear Mrs. Mullins:

At your request we have given attention to the case of Marjorie A. Mullins versus Clinchfield Coal Corporation and Chesapeake & Ohio Railway Company, in which judgment was entered on February 24, 1955, by the United States District Court for the Western District of Virginia.

We have done this in accordance with our undertaking to give you an opinion on the advisability of attempting to reopen the case for further proof or of taking an appeal. To this end we have examined the following: the District Court's final opinion, the transcript of the evidence at the trial, and the briefs and other papers which you have sent us; copies of the deeds to you, of the two sets of findings of fact and conclusions of law, and of the judgment order (such copies having been furnished us by Thomas B. Gay, Esquire, of Hunton, Williams, Gay, Moore & Powell, Richmond, your counsel in the District Court); and numerous other papers in the office of said firm, including deposition transcripts, letters, photographs, maps and other exhibits. We have examined certain authorities bearing on possible grounds of appeal. We have reviewed with Mr. Gay and his associate, Robert P.

Buford, Jr., Esquire, the salient facts involved, the theories on which the case was instituted, prosecuted and defended, and the principles of law which the Court appears to have applied in reaching the decision.

We have not gone to the office, in Abingdon, Virginia, of the Clerk of said District Court to examine the court record of the case, being of the opinion that from the papers we have examined and from our discussions with Messrs. Gay and Buford, we have gained a knowledge of the matter sufficient for the present purpose and, further, that an attempt to do so would unduly delay the presentation to you of this letter of opinion, considering that the period for taking an appeal will expire on March 26, 1955.

We are sure you realize that in the time available to us it would not be possible to make a minute examination of every part of the voluminous record of this case, to do exhaustive research on all the questions raised in this record, and then to consider and prepare our opinion in time for you to act by March 26. We have gone into all these matters in the manner and to the extent which we deem sufficient for our present purpose.

Our undertaking here is limited to the giving of this opinion whether it would be advisable to attempt to reopen the case or to appeal. We have not undertaken to, and have not given any consideration to, the other questions which you have mentioned to us, such as those stated, for example, in your letter of February 18, 1955. The shortage of time and the complications of the primary matter have not permitted attention to such questions, which are beyond the scope of our undertaking.

At this stage of the case you are not in any position to reopen it to take further evidence. If the appellate court should find that some phase of your case had not been fully developed, as, for instance, the matter of damages, it might order a new trial for further evidence on this question alone. This same reasoning applies to any other phase which the appellate court should deem not fully developed. However, much would depend upon the appellate court's views of the matters of law presented and of

your opportunities to present your case fully in the court below. It seems to us that you did have full opportunity to be heard and that you presented all the evidence available to you on the matters involved.

We have carefully considered this whole matter and regret that we must tell you that in our opinion an appeal would not be justified.

In reaching this opinion we have carefully weighed many factors which we will not attempt to enumerate in the following summary statement. In the first place, and perhaps of chief importance, are the opinion of the District Court, announced at the conclusion of the final argument on December 20, 1954, and the findings of fact and conclusions of law filed by that Court on February 24, 1955, first, those supporting the dismissal of the action as to the defendant Chesapeake & Ohio Railway Company and second, those supporting the final judgment that day entered. As you have copies of said opinion and of said findings and conclusions, we will not restate them.

We note initially, as a factor of some weight, the history of this suit. The suit was started on July 25, 1951, and was tried from July 12 to 21, 1954. Pre-trial procedures were utilized at length, including depositions and the filing of affidavits and exhibits, and the questions raised in such procedures were briefed and argued. Before the trial the Judge viewed the premises. During the trial each party appears to have had ample opportunity to adduce evidence. The transcript of the evidence at the trial runs to 1264 pages. Some two hundred exhibits were filed during the trial, including many large maps and aerial photographs. Expert witnesses testified for both sides. Following the trial elaborate briefs were filed, after which the case was argued by counsel.

It has also been a factor of some weight throughout our consideration of this matter, that the conclusions of the District Court on the question of good faith are developed in some detail in the findings of fact. Like attention must be accorded those parts of that Court's opinion of December 20, 1954, which deal with that subject.

You are no doubt advised that in the Federal courts, under a rule of procedure known as Rule 52(a) of the Federal Rules of Civil Procedure, the findings of fact by the trial court will not be set aside on appeal "unless clearly erroneous", and "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In your case the trial judge was the trier of the facts both on the matters relating to injunctive relief and on those relating to damages. We must weigh your chances of success in the light of both of the quoted portions of this rule.

We submit the following opinion on the three phases of your case, the injunctive relief, the damages for coal removed, and the expenses of an appeal:

(i) *Injunctive Relief.* Basically, your case here was that you were unable, as a practical matter, to mine your coal because of interference by Clinchfield. Originally you charged both Clinchfield and the C & O with conspiracy to interfere with you, but this phase of the case was ended when the C & O was dismissed during the trial, at the close of your case in chief. Because of such interference, you sought an injunction to force the defendants, among other things "to relocate or remove the aforesaid tipple, preparation plant, railway tracks, sidings and structures to the extent necessary to afford plaintiff full and free access for mining purposes to the coal upon the tract of land where said tipple * * * are now located".

To succeed in this effort, that is, to justify such relief in equity, we believe that you would have had to establish the existence of a substantial quantity of coal and that the coal could be successfully mined only through the use of facilities impossible without the removal or relocation of Clinchfield's installations. In this view of the case, apparently the one taken by the Court, in order to establish that Clinchfield's installations effectively blocked mining operations by you, it was necessary that you show how you are blocked. This led the Court to the requirement that you show a present plan for mining the coal. To say it another way, your complaint sought a mandatory injunction and it

is obvious that the Court took the view that you would be entitled to such an injunction only on the basis of a present plan to mine. We cannot say that this reasoning was unjustified in view of the nature of your complaint.

The evidence showed to the satisfaction of the Court, and the Court so found, that your tract, known as Upper Bond, contains very little coal now minable, and hence that you need only rather simple facilities, which can be installed and operated without the removal or relocation of more than a minor part of Clinchfield's facilities; and further that you have no bona fide present intention to mine the coal. These findings control and require the adverse decision on the prayer for injunctive relief, unless they are "clearly erroneous", and we believe there is evidence to support these findings.

An injunction is not a remedy which issues as of course, and there is respectable authority for the proposition that an injunction will be refused which would bear heavily on the defendant without benefiting the plaintiff, as where the inconvenience and injury to the plaintiff are not of a pressing character and the result of the injunction would be to cause a large loss to the defendant, even though there is no dispute about the wrongs committed by the defendant. On this theory you would not be entitled to an injunction unless you could show affirmatively "inconvenience and injury * * * of a pressing character" since it seems clear that the injunction would "cause a large loss to the defendant."

In these matters of equity jurisdiction the trial chancellor necessarily has discretion, and an appellate court will seldom interfere unless it feels that the action below went beyond the proper bounds of that discretion. Here again is felt the weight of the findings of the District Court on the question of good faith, a matter of the first importance in equity matters.

Further, relief by injunction is an appeal to the equity side of the court and calls for an application of equitable principles. One of these principles is referred to in the law as the maxim "One who seeks equity must do equity", and another as the maxim "One who comes into equity must

come with clean hands". You, the C & O, and Clinchfield introduced into evidence a large amount of correspondence between you and others and a great deal of other evidence concerning your conduct and activities, all of which was construed by the Court as establishing an attempt to extort from Clinchfield sums out of all proportion to the value of your property. There is in all this evidence certainly some support for the Court's findings that you have not acted in good faith. Here again there are findings which, although some possibly involve matters of law, also constitute findings of fact which on this record we cannot say are "clearly erroneous". We could not argue conscientiously before the Circuit Court of Appeals that these findings of the District Court are "clearly erroneous". On a question of this nature, weight would have to be given also to the rule that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

There is another question in regard to the injunctive relief: Assuming you could get past the first hurdle, the matter of good faith, how could a court of equity, as a practical matter, grant injunctive relief on this record? We believe that you recognize that even a surface owner has certain rights. A court would have to define Clinchfield's rights in reference to your title and mining rights. Apparently the District Court had trouble here. First, it could not find that you had determined upon a definite plan of mining. Second, it could not determine from the record the parts of the surface which would be required for such definite plan.

Again assuming that you could get past the first hurdle, the matter of good faith, it may be that Clinchfield's acts in occupying parts of the coal seams from which coal was removed by it (cutting down through surface and subsurface strata into the coal seam) constitute a continuing trespass which would entitle you to injunctive relief against maintenance of the dust bin and certain of the tram and side tracks. We understand that the Supreme Court of Appeals of Virginia has held that the coal owner does not

own the containing space but only the necessary incidental easement to use the containing space for support and for the purpose of getting out the coal. (*Clayborn* v. *Camilla Red Ash Coal Company*, 128 Va. 383, 105 S. E. 117.)

Your remedy for the coal displaced would be in damages, not by injunction against a continuing trespass, if we are correct in our interpretation of the Virginia case. In so far as the installations are on the coal itself, as distinguished from the space from which the coal has been removed, there would seem to be a continuing trespass. Part of the installations actually are on the seam in which the fee title is owned by you. It is questionable, however, in view of the rule stated in the paragraph beginning near the bottom of page four of this letter, whether the circumstances regarding these installations and the nature of the injury to you, as they appear from this record, are such as to warrant a court in granting you a mandatory injunction. The Court's findings are adverse on the matters involved here. What you might accomplish in this respect would be outweighed by the considerable expense of testing the question, as will be pointed out to you later in this letter.

(ii) *Damages.* The fact that Clinchfield proceeded to remove coal without authority from you, knowing that it did not have the title to the coal, and continued to do so during the pendency of the suit, without first having its rights judicially determined, leads us to conclude that it was a wilful and not an *innocent trespasser*. We interpret the law to be that one is not acting in "good faith", if he knows the facts and proceeds to act recklessly, in disregard of the claims of others, even though he may believe his own claim to be good. In the finding of good faith on the part of Clinchfield, we believe that the Court misapplied the law. If we are correct in our interpretation of the law, you may have a ground of reversal in respect to the amount of damages for the coal actually removed by Clinchfield.

You will observe that we say "may have". The authorities are not clear on the application of the measure of damages for a wilful trespass where the wrongdoer, in converting property to his own use, destroys it rather than enriches himself by receiving the proceeds of sale. In the latter case, if the article is coal, the damages are

the value of the coal at the pit mouth without deduction for the cost of mining and removing the coal. If the court applies the same measure, and we believe it might be warranted in doing so where the coal is so intermingled with soil that it is placed beyond the reach of the owner, then the same measure, the value at the pit mouth without deduction for the cost of mining and removing the coal, would require the award by the court of a larger sum than you recovered for the 5,454 tons of coal removed. The record here is not clear on the pit mouth value, if any, of the coal removed, but taking the price of $3.25, the price of slack coal, as the value of your coal, it is possible that an award of $17,725.50 could be sustained as recovery of damages for the 5,454 tons of coal removed.

It has been held that one of the elements of damage for conversion of property is interest which the value of the coal or other article would have earned had it been received on the date of conversion. The rate of interest may vary and there is no certainty that it will be allowed at all or, if allowed, at what rate. Assuming a rate of 3%, a rate which has heretofore been allowed by the Circuit Court of Appeals for the Fourth Circuit, there is a possible recovery in interest of $2,000.00 to $3,000.00.

We believe, however, the maximum you could hope to recover in damages, including interest, would be approximately $21,000.00.

The chief objects of your suit being equitable in nature, it must be kept in mind in considering the matter of damages that it is impossible to predict how much, if any, weight will be given in this connection by the Circuit Court on appeal, or, on remand, by the District Court, to the equitable maxims mentioned above and to the trial court's findings on good faith. Being in equity, we cannot escape the feeling that they would have some part, at least, perhaps intangibly, in the ultimate decision.

(iii) *Expenses of Appeal.* You have already invested in this case a very large sum of money, which you indicate to us to be well over the figures above mentioned. Upon

appeal you can anticipate a large initial expenditure for the printing of the record and briefs and for traveling and other costs, which may well run to several thousand dollars even if only a part of the record is printed in the appendix to your brief. You will, of course, have substantial attorneys' fees. Considering the problems inherent in a record of this size, the nature of the questions involved, and the extent of the findings against you, we would anticipate at the very least an attorneys' fee of eight or ten thousand dollars. We understand that your counsel in the District Court are not willing to participate in an appeal, since they feel there is no reversable error. Other counsel would necessarily have to become acquainted with this voluminous record. The work would be tedious and difficult and would require skill and experience in appellate matters in the Federal courts. A substantial retainer might well be required.

The cost to you might substantially exceed the amounts stated in the preceding paragraph, which we suggest as probable minimums. A good deal of the initial cost would depend upon how much of the record your appellate counsel thought necessary to take up to the Circuit Court of Appeals.

If your counsel should take up only a part of the record, and if Clinchfield should take up another part, your counsel might well want to take up still more to meet the parts selected by Clinchfield. For this purpose also a substantial sum would have to be immediately available.

Also you would have to be prepared for a possible assessment against you of the costs of Clinchfield if it should prevail on the appeal. Since Clinchfield would undoubtedly want to support the findings of its own good faith, and of your lack of it, it would be expected that it would take up the whole record, or most of it, which could easily involve a cost of some thousands of dollars.

As you have found, Clinchfield is a determined antagonist and, if you should prevail in the Circuit Court of Appeals, might attempt to take the case to the Supreme Court of the United States. This also would involve substantial expense to you. We mention this because we

would not want you to overlook this possibility in calculating the cost.

We cannot speak for other lawyers, but if we were to consider handling an appeal of this case, we would first want to be assured of the immediate availability of ten or twelve thousand dollars, at the very least, for the payment of expenses and initial counsel fees. In the event you should prevail, further counsel fees would probably be in order; and, if you should not prevail, you might well be assessed with the costs incurred by Clinchfield.

(iv) *Summary.* As we have suggested above, the most you could hope for would be an increase in your recovery to a total of some $21,000.00. Against that, which we must say is only a bare possibility, you must weigh the fact that you would incur an initial cost of more than half the maximum possible recovery, with the chance of still further substantial outlays.

All-in-all, considering the fact that the timber leans against you in view of the District Court's opinion, findings of facts and conclusions of law, the fact that the suggested grounds of appeal are at best somewhat doubtful, and the facts stated above about the certain and the possible expenditures involved in an appeal, we cannot believe that the gamble is worthwhile. We cannot recommend an appeal.

Feeling as we do that an appeal would not be justified by a reasonable hope of reversal, and in order that you may proceed at once toward securing other counsel if you so desire, we inform you now that we would not be able to represent you on appeal. Our present undertaking was to give you our opinion whether an appeal is advisable. That we have now done.

Since the time within which you must give a notice of appeal is short, being 30 days from February 24, 1955, the date of the judgment, we are rushing this opinion to you so that you will have an opportunity, if you see fit, to consult other counsel.

Very truly yours,

ARCH M. CANTRALL
Arch M. Cantrall

## Letter Dated March 17, 1955, Stathers & Cantrall to Mrs. Roy Mullins Which Was Contradictory and Urged Sell Out to Clinchfield Coal Corporation.

Law Offices

STATHERS & CANTRALL

March 17, 1955

Mrs. ROY L. MULLINS,
305 Harrison Street,
Frenchtown, New Jersey.

Dear Mrs. Mullins:

Your letter of March 14 asks my opinion on several questions. I offer the following comments:

First, and of principal present importance: Your questions all go to what you should now do, and, if you have not already done so, the one thing you can properly and should now do is this: You sent me Mr. Gay's letter to you of January 19, on page 6 of which he asks your consent that he approach Mr. Stuart regarding a possible settlement. Mr. Gay, as your counsel in the suit, is the best and natural one to make this approach. If you have not already done so, I strongly urge that you authorize Mr. Gay to do this. Clinchfield might be willing to settle in order to avoid the expense of an appeal, as its counsel should recognize that there is always some possibility of a reversal. The possibility of a settlement should certainly be explored. This must be done immediately, as the time for appeal expires soon.

Second, as to several of your questions, I do not know how you can have a lawyer act for you "without it resulting in * * * more legal work". Further, I do not know you can engage anyone, of any business or profession, to act for you or advise you without becoming obligated to pay him for his services. There is an old saying, a very true one, that free advice is worth what it costs.

Third, as to your first question: I cannot imagine that any mere request would now cause Clinchfield to remove its tram tracks. Clinchfield would take the position that the question of removal has already been determined in your suit. Unless you would succeed to that extent on an appeal, it might well require more litigation to determine whether or not the actual holding in this suit precludes you from claiming a continuing trespass. That is a difficult question and I would not want to attempt a definitive opinion without thoroughly considering the question.

Fourth, as to wheelage royalties: That a coal owner would be entitled to wheelage from a surface owner is a novel proposition that has not, to my knowledge, been elsewhere asserted. This question, also, I would have to consider thoroughly before expressing an opinion. Here, again, would have to be considered whether the decision in your suit precludes you from raising this question.

I have heard of no contract between you and Clinchfield under which you would be entitled to wheelage. You could not have wheelage as "a contractual matter" without a contract.

Fifth: Your third question is what you should now do. You own the coal under Upper Bond and you have the right to mine that coal. You can mine it now or wait for a possible future increased demand. Which you choose depends upon whether you want the return now, or prefer to wait, perhaps for many years, in the hope that the demand and price will then be greater. It is possible that in years to come coal not now minable may be valuable.

Your 3A: The rights of C & O were to some extent determined in your suit. If your financial situation is, as you say, presently weak, I could not encourage you to engage in further litigation unless the basis is unquestionable. I have not studied the questions you mention about the substituted deed, the A. F. E. reports, and the Highway Department entanglement, and cannot express any opinion thereon. What little I know of them, from your letters, does not lead me to feel that there is here any sound basis for litigation by you.

As to removal of Blair seam: This would have to be done by stripping. In your suit the court found as a fact that at the date of your acquisition of title the usual method of mining coal, known and accepted as common practice in Wise County, Virginia, was the method known as deep mining. Unless set aside on appeal, this is binding on you.

I know of no court decision determining whether, in the face of the fact stated in that finding, your particular mining rights, acquired in 1944, give you the right to strip mine. The West Virginia cases involve deeds made many years ago, and hold that the broad words of the mining rights are limited by the fact that strip mining was not contemplated by the parties at the times the deeds were made. Whether that rule would be applied to a deed made in 1944, I do not know. If you tried to strip the Blair seam you would probably meet an injunction suit by Clinchfield, claiming that the rule applies because of the finding mentioned above.

Your 3B: See above at my "First".

Your 3C: My notion of the way you should proceed is this: lease the Upper Bond coal to an operator on a royalty basis, and let him work out the details with Clinchfield, C & O, etc. Those are practical operating problems to be worked out in relation to the way the operator wants to operate.

Even if you did set up an operation as you suggest, I would not expect an operator to split the profits with you. Normally an owner receives only royalty unless he finances the operation.

Your 3D: See above as to stripping.

Your 3E and 3F: See above as to stripping. Also see my "Third".

I trust that these comments will be of some assistance to you. I urge that you immediately ask Mr. Gay to sound out Mr. Stuart on the possibility of a settlement and that you accept any offer which has a reasonable relation to the royalty value of the Upper Bond coal presently minable by deep mining methods. That value is the actual extent of your present interest in Upper Bond.

Sincerely,

ARCH M. CANTRALL

**Letters Dated April 3, 1948, from A. R. Mathews, President of Clinchfield Coal Corporation to Marjorie A. Mullins, Exhibit No. 83. Her Reply Dated April 9, 1948, Exhibit No. 84.**

CLINCHFIELD COAL CORPORATION
DANTE, VIRGINIA

April 3, 1948

Mrs. MARJORIE A. MULLINS
305 Harrison Street
Frenchtown, New Jersey

Dear Mrs. Mullins:

Referring further to your letter of March 26, we note that you make very large demands upon us. You demand a $500 monthly payment of what you call "punitive damages", to run over a period of twenty years, which would aggregate $120,000. You also demand that we mine and sell your coal for you at our expense, paying you the gross price received. You also demand dumping privileges through our tipple for all coal now owned by you or hereafter acquired by you or by any of your heirs or assigns, which would apparently take care of all Mullins coal to the end of the world. You also demand the conveyance to you of various tracts of coal and of surface in that area. The aggregate cost to us of submitting to your demands is difficult to estimate, but would evidently amount up into the hundreds of thousands of dollars. This aggregate would certainly be many times any value which could conceivably be assigned to your coal on the land in question even if we had destroyed it and were obliged to pay its full value.

We also note that you "do not care to have a counter proposition submitted".

Your demands are exorbitant and out of all reason. We can only conclude from them either that you do not desire

to arrive at any agreement with us, or that you are under the impression that your legal rights are such as to enable you to force us to pay whatever you might feel inclined to ask, no matter how oppressive. In Mr. Rush's letter to you of February 27 and in our recent conference, we endeavored to explain to you that in our opinion you have no such rights as you apparently suppose you have. In view of the fact that you continue to make demands on us which you must know we could not possibly submit to, it seems fruitless to discuss further with you the question of your and our respective legal rights in this property. You continue to insist that we, as the owners of the surface, have no rights which you are required to respect. This theory of yours we must respectfully decline to accept. We must also decline to comply with your demands which are based upon that theory.

As explained in Mr. Rush's letter to you of February 27, the improvements which we have made on the Upper Bond Tract have not deprived you of any of your rights. Our improvements were planned and located so as to leave you all reasonably necessary means of access for the purpose of mining and removing your coal, which we believe to be *all* you are entitled to. The greater part of the outcrop line on the South side of Meade Fork, and all of it on the North side, are left clear for your access to the coal, including the location which our Engineers advise us will be the most favorable from the point of view of economical and successful mining. We have left you the best slopes for the purpose of removing the coal by chute, and also the best points for opening into the seam from the point of view of drainage and access to the highway and railway. In fact, the improvements which we have constructed upon this tract, and which had resulted in inducing the Railroad Company to build into Meade Fork, have considerably enhanced the value of your coal by making it more accessible.

We suggest, if, as you say, it is your wish to mine this coal at present, that you let us know the point or points in the outcrop line where you wish to open up the seam. We will then immediately make whatever rearrangements

are necessary, if any, in our temporary construction and structures to give you a clear line of access. This suggestion is, of course, on the basis that you will not choose points which would involve the removal of our tipple and other permanent improvements, since those are so located as not to block you from reasonable access to your coal, and their removal is not necessary to the reasonable enjoyment of all of your rights.

Yours very truly,

A. R. Matthews
President

ARMatthews
aa

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April 9, 1948.

Clinchfield Coal Corporation
Dante, Virginia.

Dear Mr. Mathews:

I hereby acknowledge receipt of your letter of April 3, which was in reply to my letter of March 26th. I have examined same carefully. It was my impression at the conclusion of our conference in Norton, that you were agreeable to the points of settlement discussed by us and requested me to submit my proposal in writing along those lines. Evidently there has been some misunderstanding. Therefore I'd suggest that you submit to me your proposition for settlement with my proposal in mind.

The dumping priviledges asked for in item #6, I too feel is unreasonable and will withdraw them.

Your conclusion that I do not desire to arrive at any agreement with you, is wrong. If you will review the correspondence passed between us since October 1947, plus my recent trip to Va. and the arranging of the meeting to

discuss our controversy proves enfatically that I am trying to avoid for us both a litigation with possible costly delays to your company and am endeavoring to reach an agreement. However I have been reliably informed by one of the most highly rated attorneys in Richmond as well as by four attorneys in Wise County, that I am in a position to demand a strong settlement as I have a just claim against your company for illegal deprivation of my rights both to mine my coal with freedom and in the most economical manner as well as to drill with freedom for the possibility of gas and oil.

The aggregate cost to you should not be computed in the terms of the value of my coal "even if you were to destroy it" but to the cost to you of having the courts award me a verdict and compeling you to remove your improvements or pay an equal amount.

I would like to say in conclusion that I don't intend, in trying to reach an agreement with you, to tolerate having you delay unnecessarily and carry the correspondence on indefinitely. It is to your advantage by far to have the matter finished. It is my advise to you, that if you are sincere in your efforts to settle our difficulties, to make this proposition definite now. Because if not I will consider the effort I have made worthless, and will immediately proceed in another direction without further to do.

Of course this letter is written without prejudice to my rights and is not to be considered a waiver of any rights or claims I have been reliably advised I have against you.

I shall expect an answer from you within the next week.

Very truly yours,

Marjorie A. Mullins.

**Letters Dated From April 21, 1955 to March 12, 1956 to Honorable Alfred E. Barksdale, Honorable Morris A. Soper, President Dwight D. Eisenhower and Herbert S. Brownell, U. S. Attorney General.**

April 21, 1955.

Honorable ALFRED E. BARKSDALE, Judge,
United States District Court,
Abingdon, Virginia.

Civil Action 275.

My dear Judge Barksdale:

I am writing this letter to ask you to favor me with as long an extension of time as is possible for you to give under the Virginia Law. I have as yet been unsuccessful in locating a reputable law firm to take up my appeal and to whom I can designate the Contents of the Record.

I had a review of my case made by Stathers and Cantrall, Clarksburg, W. Va., and they advised me that in their opinion, Clinchfield removed the coal without authority and continued to do so during the pendency of the suit, without having its rights judicially determined, made them believe Clinchfield was a wilful trespasser. Therefore, they were guilty of bad faith. That would in turn change the amount of damages to price at the pit-mouth plus interest of 3% or $21,000. Further since their tram tracks continue to rest upon the actual coal gives rise to thought that Clinchfield is now a continued trespasser gaining an added advantage which their surface deed does not entitle them to. The containing chamber, under Virginia law, belongs to Clinchfield but they can not make further continued use of the remaining coal in the seam. Therefore, to do so constitutes a wheelage royalty payment. I do not blame you because Mr. Gay did not bring this out or argue it with cases at law. I hope you will not believe me to be as bad as they painted me.

Most respectfully yours,

MARJORIE A. MULLINS.

April 28, 1955.

Honorable Alfred E. Barksdale, Judge.
United States District Court.
Western District of Virginia.
Abingdon, Virginia.

Re: Mullins *vs.* Clinchfield Coal Corp.
Chesapeake and Ohio Railway Co.

Dear Judge Barksdale:

I am writing to thank you for the generous extension of time granted me in order to seek new counsel to perfect the appeal in the above named case. However, since Mr. Gay's refusal, I have just returned from a trip into West Virginia and Virginia seeking legal assistance. Stathers and Cantrall refused me. Chapman Revercomb, Esquire of the firm of Revercomb and Price agree with Mr. Cantrall that there is a continued trespass in both the refuse dumping which last summer was almost up to the outcropping of the Clintwood seam and in the continued transporting of coals through and on top of C bench on the south slope via Clinchfield's tram tracks. Mr. Revercomb insists it was a wilfull trespass and disagrees with the Court's findings that it has no value and then places a value of 25¢ on it in the next paragraph. He too feels that the value should have been pit mouth price plus 3% interest or $20,725.50. But he refuses to appeal the case. Just as soon each attorney learns that Mr. Gay brought the original case and refuses the appeal, it acts as an automatic prohibition of their acceptance of an appeal. But each one in turn feels Mr. Gay should stand beside me now and take his chances with me and could do it faster and less expensive for me. I saw Thomas B. Jackson, Esquire, who was going to call Mr. Gay. LeRoy Cohn, Esquire of Witt and Cohn, John J. Wickers, Esquire, and Fred B. Gentry, Esquire, Mr. Woodward, Esquire, all refused me.

Therefore, I am writing to ask whether there is any way in which I could file my own brief in behalf of myself? I realize now after talking the case over with these attorneys and others at home, and Champian C. Boles and Francis C. Lee, past and present Associate Attorney General, W. Marshall King, and William C. Seifert, Esquires of the State Corporation Commission that Mr. Gay has misrepresented and mishandled the case.

I now understand that a cease and desist injunction was the first mistake Mr. Gay made which in turn would have stopped the dumping and the trespassing and the truck ramp and conveyor, additional tram tracks, slack coal bin and conveyor and trackage, additional tonnage of my coal, additional creek and road changes, dispatcher's office, additional poles and wiring from being constructed or removed or changed during the pendency of the suit and which would not have caused the extended and unreasonable delays for me because Clinchfield could not have endured and been a party to those delays.

The second grave mistake was not filing an operational plan to allow the Court to measure the damages by, and which only served to point up more perfectly what Mr. Stuart was trying to have the Court believe or that I do not have a bona fide intention of presently mining my coal. I do have that intention. My intention is for a co-operative preparation plant where each miner owns shares and even though he sells his coal to that plant during the year, will at the end of the year receive a share of the dividends. This insures me of receiving ample tonnage. It would be non-union, because we are joint owners. Coals now going to Rocky Fork and shipped by another railroad N. W. would be diverted to C. & O. I am told to prove your client's damages is the A.B.C.s' of law.

A plan would have proved to the Court how the road change adversely affected my surface easements due me under my mineral rights. The property was funnel shaped and at the narrowest portion or at the west end of the valley or bottom land, there would not have been room for a straightened creek and road and main tracks and my

side tracks and Clinchfield's load tracks. So that the road change without my permission, physically allowed Clinchfield to locate not only its load track but all the balance of the operation which remains to-day blocking me from economically mining the upper Bond Tract but also precludes me from having the first right to be located with my co-operative plant on C & O right of way, by lease contract.

Another early mistake by Mr. Gay was not naming the Commonwealth and the Highway Department as a party to the suit and requesting the revocation of Permits 30832-S and a second permit I have never been able to locate, directly at the tipple entrance. Commissioner Anderson gave Mr. Gay the wrong permit numbers, and as late as 1953, I had to dig through 1946 dead files at Wise and Bristol Highway offices and I came up with the correct permit and I requested Mr. Gay to correct his complaint filed in 1951. In 1950, Champian C. Boles, indicated to me that the Commonwealth would be a party to my suit whenever I found an attorney and he suggested Mr. Wicker, Jr. to me but Mr. Gay re-accepted the case simultaneously and since he had made a brief and I was worried about the Doctrine of Lashes, I felt it wise to let him continue with it.

I spent two hours last Wednesday pleading and begging Commissioner Anderson to revoke this permit and in fact I became quite emotional when I did so and he and the six gentlemen sitting in on that conference still rejected my plea. I explained he had in his hand the instrument which could correct a great injustice, without additional expense and time. I have spent $99,000 odd fighting for my rights to date. I inquired how much longer the Commissioner was going to give C & O to fulfill its commitments to the Commonwealth under the terms of the permit. They have now had nine years at great sacrifice and cost to me. I told him every day it continues, since my written request and is not revoked, the more I am damaged. Commissioner Anderson said he would not revoke it until C. & O. acknowledges that they cannot fulfill its commitments. I said at that rate the road would then be taken by adverse possession under prescriptive title in 1961 or 15 years from the

date changed. I explained I was both a land and mineral owner and I too deserved some consideration. My impression was the Commissioner is very stubborn and decidedly an unfair and unjust person.

Mr. Gay failed to put my C. & O. half in as evidence. He dismissed my star witness Mr. Tollie R. Adams, Drag-line operator for Codell who saw and did remove Blair seam coal. Mr. Gay failed to introduce the Authority For Expense Reports filed by the railroad 1948 16626, Account 2 and 3, Land for Transportation Purposes and Grading. To prove the map Va-8 #10 filed with I.C.C. does not jibe with A.F.E. reports and further prove the Clinchfield Corp. promised a deed by title, to the right of way and later gave only an easement with many restrictions and which keeps me from my public dock site for foreign coals and further proves C. & O. willingness to be a party to this fraud by their failure to condemn for title to its right of way and consummate its commitment with the Commonwealth.

I cannot understand Mr. Gay's motives for this tragedy. I paid him whenever he presented a bill, even borrowing to do so on our life insurance policies. I did many personal favors for him. Loved and respected him as my own father. In no way was I dictatorial or tried to run my case, in fact had I been less congenial about the things that puzzled me, perhaps I'd have been better off to-day. I even located cases to prove the continued wheelage royalties but he failed to file a final written rebutal brief before December 20th and then did not advance an argument based on a continued trespass.

April 17th, Sunday, I called him at his farm from Washington, D. C. and said I felt so exhausted I could not continue much longer and begged and pleaded with him to appeal and he was cruel and harsh and the station attendants had to help me to become more composed. You see Mr. Gay nor his firm will not explain why I lost it or answer certain questions, in fact Mr. Gay said, "I have neither the time nor the inclination." In another letter, "a post mortem never served any useful purpose. . ." To whom am I to go for these answers, if I cannot go to my attorney? I

spent $32,000 with Mr. Gay, $55,000 to $60,000 all told and prior to his participation $25,000 and then other expenses, loss of income and taxes, and interest and ect make up the balance. (Out of packet and ect.)

I have worked hard on this case because I wanted my life's work to prove that the little man's deed is just as sacred as a man's will in death. That two corporations and Commissioner cannot use his deed as their own. Other women work on civic problems and do club work and work for charity, but this is my work, as I see it. America was not founded on such principals. I want all the Halls of Record in these United States to stand for something.

Would you advise me to go to the Legal Aid Society in Virginia? Or may I file my own brief? I could do it, I believe. Or, could you persuade Mr. Gay for me?

I admire you for not allowing the Court to be used by Mr. Gay as a means of gaining a settlement for his cliente based on either no proof or only partial proof. I admire you for not allowing the deception advanced by Mr. Gay to degrade a Federal Court by rendering a favorable decision when he had done nothing to deserve a favorable decision for his cliente. After all, you sit in judgment daily and yours is a duty to observe the sincerity of those performing before you, including the attorneys. A Federal Court should not be used as an instrument to produce a half-justice. I could never understand why Mr. Gay tacked a restriction on to the injunction, he was seeking. Mr. Revercomb could not understand it either, and I was satisfied it did not go over well with the Court.

The only honest thing that has resulted from this whole case is the Court's Decision. I too, believe the Court erred but an honest mistake is always forgiven. It is the dishonest and willful ones that are unforgivable. Mr. Gay could never have made so many honest mistakes in any one case. Doctor Mullins does not want Mr. Gay to appeal it. But if he was to do so, I would guide him this time, and his would almost result in a confession of his mistakes to the United States Court of Appeals.

Sincerely yours,

Marjorie A. Mullins

UNITED STATES DISTRICT COURT
Western District of Virginia
Lynchburg, Va.

ALFRED DICKINSON BARKSDALE
District Judge

May 18, 1955.

MRS. MARJORIE A. MULLINS,
305 Harrison Street,
Frenchtown, N. J.

Re: Marjorie A. Mullins, Plaintiff, *v.* Clinchfield Coal Company and Chesapeake & Ohio Railway Company, Defendants, Civil No. 275—Abingdon Division.

My dear Mrs. Mullins:

As my secretary wrote you on the 3rd instant, your letter of the 28th ultimo was received while I was in the hospital following an attack of pneumonia. It has now been brought to my attention and I have given it my careful consideration.

I find that your somewhat lengthy letter is principally a narrative of your own activities, with statements of your own opinions and those of others. I make no comment on your assertions, because I think comment by me would be quite improper under the circumstances. However, I do wish it definitely understood that my failure to comment on your assertions is not to be in any way construed as agreement on my part with such assertions.

Besides your own narrative, you request that I advise you whether or not you should go to the Legal Aid Society in Virginia, whether you may file your own brief, and whether I could persuade Mr. Gay to act for you. It seems to me that it would be obvious to anyone that it would be

quite improper for me to give you any advice or make any suggestions to you as to the course you should pursue or steps you should take in your appeal from the decision which I have recently made against you. It would be equally, if not more improper for me to undertake to intercede with Mr. Gay on your behalf.

As there should be no private correspondence between you and me, I am entering an order making your letter and this reply a part of the record in the case.

Yours very truly,

A. D. Barksdale,
United States District Judge.

ADB/IY
Copies to—

William A. Stuart, Esq.,
Abingdon, Va.

Fred B. Greear, Esq.,
Norton, Va.

A. G. Lively, Esq.,
Lebanon, Va.

Thomas B. Gay, Esq.,
Electric Building,
Richmond-21, Va.

December 10, 1955.

HONORABLE ALFRED E. BARKSDALE
United State District Court
Lynchburg, Virginia.

Re: Thomas B. Gay, Esquire.
Hunton, Williams, Anderson, Gay & Moore.

Civil Action 275.

Dear Judge Barksdale:

I have discovered all too late that Mr. Thomas B. Gay, Esquire, of the firm of Hunton, Williams, Gay, Moore & Powell of Richmond and the engineers that he selected to assist him were under the direct influence of the Clinchfield Coal Corporation and possibly the Chesapeake and Ohio Railway Company. I am confident that Mr. William A. Stuart, Esquire *designed* and *engineered* the suit filed in my behalf by Mr. Gay. A suit that Clinchfield could defend and consequently prevail in. Now I realize why Mr. Stuart was so confident through the proceedings and why Mr. Gay told me many time *in advance* of the trial that I could not hope to win it. Naturally, since he knew *in advance* that he intended *not* to defend me, *not* to represent my case properly to the Court and had *already* mishandled the facts of my case in filing and in arguments by Mr. Robertson on Motions, in filing in the wrong Court System and intending to omit filing counter-evidence, Mr. Gay knew and could advise me that I could not hope to win.

I know that I must accept the natural mistakes and poor (but honest) judgment of the attorney representing me. But I am writing to inquire whether you have any Judicial Power which under *extremely extraordinary circumstances,* would allow you to cause a mis-carriage of Justice to be annuled or corrected in some legal fashion, because it would seem that even though I am successful before the American Bar Association's Professional Ethics

and Grievance Committee, it does not erase your *undeserved* decision which will stand forever against me • • • but even more important, in my mind, is that that decision will be read and studied in later cases and may be instrumental in causing additional miscarriages of Justice to happen.

You should know that in employing Mr. Gay, I was explicit in my instructions to him that I did not desire money, that I desired to mine and operate and was employing him to get me in there mining my coal. But Mr. Gay told me that until it was adjudicated that Clinchfield's improvements were to remain that it was impossible to make an operational plan. In view of that statement, Mr. Gay files a Bill of Complaint charging that Clinchfield's improvements were interfering with my operation and then deliberately fails to file a tentative operational plan based on true tonnage figures derived by core drillings and prove to the Court these charges that he outlined in that complaint.

I explained to Mr. Gay that the settlement figures I submitted were submitted because Clinchfield invited me to do so, not because I went to Clinchfield and placed an ultimatum before them. It was not a case of my saying "you pay this or else" • • • but rather their inquiry of "what I would accept rather than interfere with any of their permanent improvements". I am not an extortionist. But I do have surface easements that they desire to own. Not only desire, but because of violations of the Virginia Constitution and their State Charters, it is absolutely imperative that they do acquire. Naturally, I am pricing what I own at the value it deserves after it is improved and made more valuable, but I do not consider the price of coal in place as its total value. The commodity is only a portion of its value and the surface easements compose the other element of it.

When I would not sell, Clinchfield decided to test me out by putting me through not only the rigors of a trial but the expense of same, based on a Bill of Complaint that was designed so that, with the co-operation of the Plain-

tiff's attorney, Clinchfield would win. In other words a "Mock Trial". Then, in my moment of great despair to have my attorney urge me to sell to Clinchfield. I could have told them not to waste their money and mine, because I will never sell my rights.

These companies first, prospected without my knowledge or permission, evidence furnished by the Bureau of Mines of State of Virginia, would prove that. *Both* companies removed coal of mine illegally, company record would prove this. Both companies violated their surface easements in using their rights to gain additional benefits encroaching upon the surface easements of the coal owner and therefore pre-empting her rights, proof in Clinchfield's deed and their easement to C. & O for railroad purposes. In addition, there was a wilfull violation of the State Mining laws of Rights of Adjoining Property Owners. Another willful trespass, in bringing 66,000,000 tons of coal from adjacent tracts for preparation and shipment on Upper Bond and now a continuing trespass because their surface easement only entitles them to Upper Bond uses. A wilfull violation of the Virginia Constitution regarding Charters to mining companies and railroad companies. Violation of State Condemnation Laws, on property adjoining Upper Bond. A willful trespass and a continued trespass in using Upper Bond Coal seams for transportation purposes because the tram tracks actually rest upon 44 inch bench of coal. Just about every known property right has been violated including the right of alienation.

Yet for ALL these crimes both these companies go free and costs are accessed against me.

That is a grave mis-carriage of Justice and it would seem that you, when you stated during my trial, that this was a matter between the parties, the Commonwealth of Virginia and Marjorie A. Mullins over the illegal relocation of Road 632 by C. & O. (a matter only to be decided in the Supreme Court of Appeals of Virginia) since under the terms of the Highway Permit, C. & O. was to deed to the Commonwealth by GENERAL WARRANTEE title the new location of the road in exchange for the Commonwealth's quit-

claim deed by prescriptive title, you should have recognized since you are familiar with Virginia laws, that my case was in the wrong Court, or a Federal Court instead of a State Supreme Court of Appeals. Certainly you should have recognized that the State Court matter should be disposed of first and if favorably so to me, the plaintiff, the balance of the suit was unnecessary. The Court's time, valuable time, was used to hear a suit which 10 days was not the real issue in this controversy. Likewise, the Plaintiff was being put to unnecessary expense and time and trouble and I might add nervous strain because the Court failed to exercise its judicial insight and dismiss the case or hold it up until the my situation with the Commonwealth was cleared. Thereby directing Justice into the right channel. It would appear to me that you are responsible for allowing this great injustice to take place. My witnesses Bryant Mullins and William Jackson tell me that they are *not* surprised that I lost my suit that it was obvious to them from the way Mr. Gay was questioning the witnesses and conducting the case, that he was "only scratching the top" and that there was a great deal more that he could have brought out in their testimony which he did not open up. If these "men from the hills" basicly illiterate men recognized this, you must have also, being a Judge with a very acute and active mind, and with greater education.

You must surely know that the Res Adjudacata Doctrine would lurk in the background and will have to be dealt with in any new endeavors of mine to gain Justice. It appears to me that you are guilty of allowing this grave mis-carriage of Justice by allowing my case to continue before you. I know that there exists the Cannons of Judicial Ethics just as there are the Cannons of Professional Ethics and it appears to me that there are many, many irregularities about my case from start to finish, including Federal Court rules.

I have spent $100,000 fighting for my property rights, rights most important to any man holding a deed. I want to leave behind me something concrete which will give hope

and encouragement to others in the future who meet up with those unscrupulous members of society who would just as soon swallow the little man's deed into their greedy, dripping jowls and extinguish his rights forever. Marjorie A. Mullins' Upper Bond Tract was to be sacrificed upon the altar for Big Business and big business would laugh forever at all the Halls of Record in these United States. God help her, if she undertook to fight these corporations who are wealthy enough to buy their way out of any situation of their making. Or, if she tries to mine, she would be treated equally rough and cruel and intolerable conditions would cause her to give up in despair. But *you* had it in your power to set her case in the right direction which would have eliminated not only the need for a hearing on the balance of the case but relieved her of this menace upon her property and allow her to exercise her rights with freedom, unhandicapped by their tricks and pranks and deviltriment.

I am hereby placing this matter back in your hands and suggesting that if you have any honesty and decency about you and any authority vested in you, to come to my rescue and take such action as you can to set aside your decision until I have had opportunity under new Counsel to take my case to the proper Court. No Judge should allow any Court in these United States to be used as a tool in order to promote private intentions and activities of a group of attorneys, willing to disregard all rules of their profession. The highest profession in the land next to Medicine. William A. Stuart, Judge Lively, Mr. Gay, Mr. Buford and Mr. Robertson and undoubtedly counsel for C. & O. are wholly to blame for making your Court the stage for their illegal and unprofessional endeavors and you for not putting a stop to it.

Very truly yours,

Marjorie A. Mullins

December 11, 1955.

Honorable ALFRED E. BARKSDALE, Judge.
United States District Court,
Lynchburg, Virginia.

*Civil Action No. 275.*

Dear Judge Barksdale:

I have just read the Appeal Court's decision and feel inclined to write you further, since the holding is apparently resting upon the findings of the lower Court THAT THE REMOVAL OF MY COAL WAS *Not Willful.* No evidence is recited to support this finding for the simple reason that there is none. Except the DEFENDANT'S Words. Since the facts and circumstances *of each removal* are glossed over, the APPEAL JUDGES like you, have ignored the facts as they existed at the time the coal was destroyed and you contented yourself with a recitation of what occurred *thereafter.* Because you were content to do that, you are responsible for this mis-carriage of Justice. Judges have to be very careful and very fair and very impartial and very determined that they hear and know all the facts.

Being a Judge, you must know that when minerals are severed from the surface, that both our rights in Upper Bond take on the character of an easement and Mr. Gay did at least file enough to show an unreasonable exercise of Clinchfield's surface easement through my coal to strata below because that easement pertains to Upper Bond ONLY. That removal was a willful trespass, it had to be, because Clinchfield owns none of the coal in Upper Bond, so the erection of a coal tipple a useless piece of business since Clinchfield had no coal in UPPER BOND to feed it with. It would be a starving tipple. UNLESS, they intended a continued trespass and an unreasonable use of its easement in the bringing in of their 66,000,000 tons on adjacent tracts thereby placing an additional burden upon the mineral estate and gaining an added benefit which their surface

easement does not entitle them too. Clinchfield is no new operator, no novice at coal law, they knew it was their duty to come to the coal owner for such a permission. They knew that they legally had no right to do this. BUT THEY DID IT, NEVER THE LESS. WHY? Because they ARE willful trespassers. You would have to determine first whether the exercise of the surface easement was a trespass before you can decide whether there is a willful, and deliberate trespass, and the same trespass rules would apply. You ignored the rule of the burden of proof.

I cannot help but think and I say this to you with all due respect to you as a Judge and to one of supposedly high integrity, that there are a great many irregularities in this case of mine that I cannot understand but which I promise you that I intend to know all about and expose Before I am through with it. It may go a lot deeper than I realize for. It was my right and perrogative to win this case completely, in every aspect of it. Every known law regarding property rights was broken by these companies and yet they go Scott Free. It appeared to me when I read your black decision against me, that you were determined to hold against me at all costs, as though you might have had a private reason for so doing. It seemed to me that you latched onto the only innocent mistake that I made during my long and tedious effort to obtain honest counsel and while under not only the physical strain but the mental strain of seeing my coal removed and the construction work advancing and being utterly powerless to stop it because as soon as I located counsel, Clinchfield and C. & O. "bought them off."

I am referring to my statement that I had priced my coal, on a basis of what it would cost Clinchfield to remove its improvements should a Court order them to do so. What else could any Court do but order these improvements off because they block me, because they are violating a surface easement in being there, because they violating State Charters to operate therefrom.

When you said that it was not a case of a weak innocent lady trying to get justice you are so wrong. I have a curva-

ture of the spine and in addition a paralyzed right hand and in addition I am not too strong physically and lugging suit cases from law firm to law firm is no easy task.

Mr. Gay told me not to "blurt out" that I had discussed my case with you when I asked you to recommend counsel to me. Mr. Gay went on to say that "if Judge Barksdale had one ounce of compunction about him, he would disqualify himself from your (My) case." I think a great deal about that remark. It puzzles me and disturbs me greatly.

It puzzles me also why you did not order engineers appointed by the Court to compute my coal removed and report findings to the Court. Instead you selected Clinchfield's figures, truly underated, even more so than the tonnages of my Mechanical Engineer Mr. Evans who had to rely on the Jones map which was basicly Clinchfield's under rated data.

Mr. Stuart, with Mr. Gay's co-operation, tried to trick me into selling and since Mr. Gay urged me after trial to sell, he is guilty of fraud, of trickery and every one else who participated in any respect, is guilty of the same thing. I expect to openly charge every one of them from the least on up to the very top, before I'm through.

I am petitioning the Appeal Court to rehear my case, by Dec. 18th. Now, is an opportune time for you to make known what Mr. Gay has done in mis-representing my case to you, and of his not defending me against the one small mistake I made but which has been magnified unnecessarily so. I too, am going to make known to them what Mr. Gay & Mr. Stuart have tried to perpetrate and are guilty of and ask for a new trial before another Judge and new Counsel and I have asked Mr. Gay to confess and I have asked Dr. Adams at Richmond, Minister to interceed in my behalf with Mr. Gay. Judge Barksdale, this can NOT be allowed to stand upon the records. Now is the time to strike it out. Will you help?

Sincerely yours,

MARJORIE A. MULLINS.

December 27, 1955.

United States Court of Appeals
Judge Soper.
Richmond, Virginia.

No. 7046
Marjorie A. Mullins *v.* Clinchfield Coal Corp.

Dear Judge Soper:

On December 19th, I filed one copy of a petition for a rehearing, in behalf of myself. Upon reflexion and in consideration of the facts disclosed therein regarding Mr. Thomas B. Gay, Esquire and his effort focused upon *losing my suit* against the Clinchfield Coal Corporation and The Chesapeake & Ohio Railway Company, it appears fruitless to file the twenty-five copies and try to reargue a case purposely misrepresented to the trial court, by Mr. Gay.

Therefore, Dr. Mullins and I have concluded that we have done our utmost to help ourselves and save our property rights when we bring to the attention of the Appeal Court the situation we now find ourselves or that we have discovered too late, that we were innocent victims and Mr. Gay took advantage of us, rather than to protect us and fight for our rights and defend me in pricing my coal too high after Clinchfield's Mr. Stuart *baited the trap* by inquiring "what I would be willing to accept instead of requiring the removal of any of Clinchfield's permanent improvements."

If you have any extremely, extraordinary powers vested in you when a situation of this nature is brought to your attention, and believe sufficiently in my honesty and integrity to allow you to use such powers, will you please do all that you can? It is not fair to us, to have Clinchfield and C. & O. influence not one attorney but four and repeatedly cause us ten years of mental and physical strain and to use all our life's cash savings in vain, until to-day we are bled out

from our long efforts. If I could have a retrial or new trial, under new counsel, I'd be so appreciative and then I'd have a fair chance of having all my evidence put in, and stand an even chance, at least, of winning.

Clinchfield and C. & O. had a bona fide intention of violating its easement in Upper Bond when they constructed a coal tipple and mine side tracks when it owned not one ton of coal in Upper Bond, and knew two years prior to the start of the construction that the Upper Bond Coal was not for sale. Private industry cannot condemn so it must negotiate but they did not negotiate for wheelage rights from the coal owner. C. & O. to-day owes land to the Commonwealth of Virginia under the terms of Highway permits and yet it also does not negotiate nor condemn in order to fulfill its commitments.

We are honest American citizens and we are sincere and we do not deserve this treatment for our effort to save, not only our own property in a sense, but other property for which others hold a deed, as we do. If you will, I'd appreciate your reading my Petition and at least, you will have an insight into the awful burden we are under.

Most respectfully submitted,

MARJORIE A. MULLINS, and
ROY L. MULLINS, M. D.

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January 27, 1956.

THE PRESIDENT,
The White House
Washington, D. C.

My dear Mr. President:

I am writing to ask you whether you would take a personal interest in an average American Citizen who has for ten years been the victim of law firms who are willing to sacrifice my rights in coal property that I own in Virginia rather than help me to receive justice in court for the acts

of two large financially powerful corporations. May I tell you about my case in hopes that you can help me because the laws of our land are made to help the individual and unscrupulous attorneys should not make a mockery of our Judicial System.

I own 96 acres of minerals (coal) and the Clinchfield Coal Corporation purchased the surface of the same tract subsequently and their deed was subject to my rights. After trying to purchase my rights, Clinchfield and the Chesapeake & Ohio Railway Co. prospected without my permission, removed 30,000 tons of my coal, built in the space my coal occupied thereby pre-empting my rights, violated their easement for main line tracks by building side tracks for industry to serve their three million dollars preparation plant and Clinchfield is to-day removing more coal periodically and have laid tram tracks directly upon my coal seam and I am utterly powerless to stop them because they have now bought off three law firms prior to trial and one firm and one Judge making a total of four. They buy off my mining engineers.

The last firm Hunton, Williams, Anderson, Gay & Moore, Richmond, Va.
(Mr. Thomas B. Gay, Esquire) failing to name the Commonwealth of Virginia as a party to my suit because of violations of Highway Department permits, brought suit and the results were that I lost and costs were accessed against Me. Mr. Gay misrepresented the case to the Court and mishandled the facts of the case. In fact, Judge Alfred D. Barksdale having discussed my case with me and suggested counsel to me and knowing me should have disqualified himself. In fact, Mr. Gay told me the morning of trial not to state under oath that I knew the Judge and went on to state that "if Judge Barksdale had one ounce of compunction about him, he would disqualify himself."

Mr. Gay limited me to seven witnesses, dismissed half of them without putting their testimony in, failed to file an operational plan to prove how their installations blocked me proving his allegations, failed to put me or my engineers

back on the stand for rebutal testimony, failed to admit exhibits of mine, failed to make use of what he did file, failed sonscienciously cross-examine their witnesses, failed to write a rebutal brief, failed to charge a continued traspass, failed to prove anything which would be helpful and I am satisfied tried to ruin my case purposely.

I have spent $100,000 fighting for my rights and given ten years of my life to do it, and in fact all our life's savings are gone, we even borrowed against our life insurance policies, and my husband is going blind.

I had contended that I was entitled to a "wheelage Royalty Payment" from these companies on each ton of their coal that they transported over my coal seam. In fact, in 1953, two years after Mr. Gay filed, I brought him to cases in point proving my theory under the law. I asked him to amend his bill of complaint to include this continued trespass. So after trial, Mr. Gay urged me vigorously to SELL to CLINCHFIELD and I declined and was asking for my final bill, although somewhat puzzled but still never dreaming that Mr. Gay was dishonest with me.

Right then, he said the thing that made me realize. Very sheepishly, he said, "Mrs. Mullins, I believe I can get you "wheelage Royalty Payments" ". Here all the five years he had the case, he was not attacking the crux of the situation.

The railroad made commitments to the Commonwealth of Virginia to deed by general warranty title, the new location of the road on my property in exchange for the Commonwealth's quitclaim deed. In nine years, the railroad cannot give that deed and the Highway Commissioner will not revoke the Permit 30832-S so the public road remains at its new location with a permit still to be fulfilled.

The object of these corporations was to whip me in court and then in my moment of deep despair to urge me to sell the rights that would entitle me to reimbursement for the monies we have spent fighting or the wheelage royalties.

No Judge should allow his court room to be used as a tool by a group of unscrupulos attorneys in order to accomplish a mis-carriage of Justice. Judge Barksdale is not fit to be a Judge in any Court much less a Federal Court.

Is there anyway that I could have this decision set aside and be granted a new trial under honest counsel and an impartial judge? My husband and I are good Americans and we do not deserve this treatment from the legal professions, it is a disgrace to the land. I feel as though I were trying to save my property and get justice in Russia rather than my own United States where I was born and where my forefathers fought for its freedom.

I will appreciate any assistance in any direction. Mr. Gay should be disbarred. Thank you very much.

Most respectfully yours,

Majorie A. Mullins.

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March 12, 1956.

Herbert Brownell, Attorney General,
of The United States of America,
Office of The Attorney General,
Department of Justice,
Washington, D. C.

*Re:* Chesapeake & Ohio Railway Co., Richmond, Virginia. Sandy Valley & Elkorn Sub-division Jenkins, Ky. to Mead, Virginia in Wise County.

Dear Mr. Brownell:

Because there is a Statute of Limitations and because I have exhausted every means possible of gaining my Civil Rights under the Constitution of United States, as well as my State Rights or Civil Rights in the State of Virginia

under her State Constitution, and or to secure legal services of Virginia law firms willing to name the Commonwealth of Virginia and her State Corporation Commission and her State Highway as a party to litigation I instigated under which I was led to believe a Writ of Mandamus against the above named Commissions would issue, that I am appealing to you for help to save property rights totally obliterated and to further secure under the Interstate Commerce Commission Act, my U. S. Civil rights to ship 1500 acres of coal in Wise County Virginia interstate.

In 1946, this railroad under Finance Docket 14850 was issued a Certificate of Public Convenience and Necessity to construct the above named spur which went through my property known as Upper Bond Tract. Under this certificate the railroad pledged to exercise its State Corporate Powers under its Charter and acquire its right of way by grant or condemnation. This the railroad has failed to do on Upper Bond and instead and in order to favor the Clinchfield Coal Corporation's Coal Preparation Plaint which is presently pre-empting my rights to the only location available for my processing plant for 1500 acres of coal or to my dominant right by deed, to lease a plant site on the right of way and ship my coal. Since there is a public road #632 which traverses the right of way, I have the physical means of bring my 1500 acres as well as any more that I can acquire in the future to such a plant site under a lease contract with C. & O. and which is one of their general procedures under their Charter.

Instead of acquiring its right of way by grant or condemnation, the railroad accepted a weak easement to surface rights in the residuum holding under Clinchfield's deed. The railroad has not in ten years tried to acquire the balance of the title to its right of way from me. Because to do so give me the right to a site under their charter. These corporations are trying to freeze me out and it make no difference which counsel I select influence is used to either have them give up in my behalf or in my last dreadful experience to bring the wrong action in the wrong court

system. Five years and $55,000 was wasted in that litigagation. Even though coal of mine was removed the third time and DURING the pendency of U. S. Civil Action 275 Abindon Division, and my estate is continuously being used daily for transportation purposes, I lost the case, costs were accessed against me and Clinchfield was labeled an "innocent trespasser" and only had to pay me .25 a ton price in site for my coal tortuously removed in an intentional violation of their surface rights to benefit its adjoining coal properties without liability.

Since Clinchfield owns not one ton of coal in the tract in question, it has no need for a three million dollar preparation plant so installations of that type and character and appurtinent trackage and the general use these companies are making of their surface rights in the residuum, is unreasonable and unnecessary and should be enjoined. That was the case Hunton, Williams, Gay, Moore & Powell of Richmond promised to instigate and they were to force the Railroad under a writ of Mandamus.

The railroad has not entitled itself under the state statutes to a franchise to operate and maintain this spur from the Commonwealth's attorney in Wise County, Virginia. Yet the State Corporation Commission will not exercise its powers which are mandatory under the State Constitution and require the railroad to formally entitle itself or give up its Charter voluntarily. The engineering department has waived its safety measures on this spur and allowed the railroad not to include treacherously steep cuts into the slope on this property and which the railroad spent $12,000 on but which slops are not included in its right of way, for future attention. Actually, it appears to me that if State Stautes had not been violated by the Commonwealth's attorney at Wise, this construction work could never have commenced.

Secondly, the railroad applied for Va. Highway Department permits and under the terms of those permits the railroad agreed to deed to the Commonwealth of Virginia by general warranty title some ninne parcels of property

on the new location of Road (Secondary # 632) in exchange for the Commonwealth's quitclaim deed by prescriptive title to this road's former location. Since all the nine parcels are contingent upon Permit 30832-S on my property, this railroad in ten years is unable to fulfill its commitments to the State of Virginia. Likewise the Highway Commissioner will not instigate proceedings which would require the railroad to do so or return the road to its former location.

I have appealed to the Governor Thomas H. Stanley and J. Lindsley Almons, State Attorney General but the whole state is protecting its two corporations even though the State Constitution and by laws are being violated and an individual's property rights are to be lost forever. Its just like I did not own the prperty yet I pay mineral taxes.

So, I am placing myself in your hands to help me. The I.C.C. Acts would require the railroad to exercise its corporate powers and allow me to ship my coal interstate but this railroad refuses to make its railroad right of way available to me.

To date I have spent $100,000 and ten years of my life trying to get law firms to help me but its of no avail. Can you apply for a writ of Mandamus to the Supreme Court of United States under the I.C.C. Act or under my U.S. Civil rights in my behalf (ex parte) under 28 U.S.C. 1651 for relief for me. If you can, it is very urgent that it is instigated im-mediately as the ten year Statute of Limitations is almost up. I beleve May, 1946.

To give you a clear picture the railroad has taken its right of way for all the 14 miles except on my tract. It takes only an easement there and hops over mine and takes the balance under proper preseedure. That is not fair. I controll $37,000 worth of coal which in to-days boom is worth many times that amount.

H. Alexander Smith

I have appealed to my United States Senator and to Mr. Frank E. Mullen, Chief Examiner to whom I have

written numerous times in my long effort for justice. I am sending a copy of this letter to each because I drastically need all the help and from big people if I am to save my property.

I also have some private information which I am just now uncovering which points to malfeasance in my case and I will personally contact you concerning it very shortly. But meanwhile, I beg you to help me if you can.

Very truly yours,

Marjorie A. Mullins.

Copies to:

United States Senator H. Alexander Smith.
Frank E. Mullen, Chief Examiner,
Interstate Commerce Commission.

**Letters Dated April 11, 1956 From Carter O. Lowance, Executive Secretary to Governor Thomas H. Stanley to Mrs. Marjorie A. Mullins, April 16, 1956 Marjorie A. Mullins to Governor Thomas H. Stanley, April 17, 1956 Reply From Governor Stanley.**

Commonwealth of Virginia

GOVERNOR'S OFFICE

Richmond

THOS. B. STANLEY
Governor

April 11, 1956.

MRS. MARJORIE A. MULLINS
305 Harrison Street
Frenchtown, New Jersey

Dear Mrs. Mullins:

In the absence of Governor Stanley, I am acknowledging your letter of April 11.

I have talked with Mr. Andrews of Shewmake, Gary, Goddin and Blackwell, who advises me the matter discussed in your letter is now receiving careful consideration. From our knowledge of the firm, I am sure you can rely upon their advice.

Sincerely yours,

CARTER O. LOWANCE
Carter O. Lowance
Executive Secretary

atm

April 16, 1956.

Governor Thomas B. Stanley.
Commonwealth of Virginia.
Richmond, Virginia.

Re: Virginia State Civil Rights of Marjorie A. Mullins.

Dear Governor Stanley:

In your absence, my letter of April 11th, was answered by Carter O. Lowance Executive Secretary. But since his reply was not responsive to my request as a property owner in the State of Virginia, for my Civil Rights from a Common Carrier Railroad, the Chesapeake & Ohio and is more of an acknowlegement, I prefer to be advised directly from you.

When you are responsible for the State Highway Commission and the State Corporation Commission not enforcing the Constitutional Provisions and Statutes governing the activities of a common carrier railroad and fail to see that it obeys its charter powers and privileges and afford me my State Civil Rights, it would appear that you are sacrificing my property rights and Civil Rights in your State. I have a time limit expiring and when you have it in your power to say the word which would put the wheels in motion yet will not do so, I can only infer that you have denied me my State Civil Rights and have been directly responsible for the scandulous way I have been made to suffer these last ten years since this injury occurred. If you are not purposely responsible, will you take immediate steps to correct my situation and permit me to ship 1500 acres of coal *interstate* under my United States Civil Right to do so. Please do not write an evading, brush off letter. I desire a direct yes or no answer to a hypothetical question of whether you intend to afford me my rights immediately before the time expires.

Very truly yours,

Marjorie A. Mullins.

Copy: Herbert S. Brownell,
United States Attorney General.

Commonwealth of Virginia

GOVERNOR'S OFFICE

Richmond

THOS. B. STANLEY
Governor

April 17, 1956.

MRS. MARJORIE A. MULLINS
305 Harrison Street
Frenchtown, New Jersey

Dear Mrs. Mullins:

With reference to your letter of April 16, you will recall that your complaint was thoroughly considered by the State Highway Commissioner some time ago.

I regret that I am aware of nothing further that the Commonwealth can do for you in this connection.

Sincerely yours,

THOS B. STANLEY.

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**Report of Shewmake, Gary, Goddin & Blackwell with Termination of Their Employment Dated April 26, 1956 Arrived in Time to Appear in This Petition as Follows:**

Letterhead of

SHEWMAKE, GARY, GODDIN & BLACKWELL
State-Planters Bank Building
Richmond 19, Virginia

DIAL 7-1964

April 26, 1956

MRS. MARJORIE A. MULLINS
305 Harrison Street
Frenchtown, New Jersey

Dear Mrs. Mullins:

As you are well aware, I have spent considerable time on the consideration of the various problems which you

have referred to me regarding your rights as the owner of mineral rights in the Upper Bond Tract located in Wise County, Virginia. It is very unfortunate that the matter has so many different facets because it is difficult to give full advice on one portion of the problem without having a complete understanding of all of the other problems involved. On the other hand, in many cases the confusion resulting from having all of the facts at one time also poses somewhat of a problem since the facts must be considered one at a time in order to advise you properly.

Under your deed of November 22, 1944 from V. F. Bond and wife, you are granted "all the coal, gas, oil and mineral rights in and under" the Upper Bond Tract. Further, your deed states that "this conveyance deals only with the mineral rights, and that the title to the land or surface is to remain in the grantors, their heirs or assigns; grantee shall have the right to dig, mine, excavate, drill, prepare for market and remove or carry away the said coal, gas, oil and minerals without liability for damages to the surface or anything thereon, nor shall grantee be liable for damages for sinking of any water on said land; with right of ingress or egress for purposes of exercising their mining rights thereunder." ( Underlining supplied.)

The rights given you under this deed are very broad and it would appear from merely considering the wording used in the deed that there is practically no limit to your rights insofar as the exercise of them is concerned. However, the deed by implication carries with it the definite restriction that only mineral rights are granted. This means, of course, that the law implies that there are other outstanding interests in the land reserved to the grantors, their heirs and assigns. These reserved rights, or remaining interests, were conveyed to Clinchfield Coal Corporation by V. F. Bond and wife by deed dated May 3, 1945.

As you have been advised by other counsel and now by my opinion in this letter, there are no Virginia cases directly in point which give an insight or direct interpretation of the conflict between your rights as mineral owner and the rights of Clinchfield which we refer to as the surface owner.

Further, there is no case of any other state which directly gives an interpretation of these conflicting rights which would be binding, as I see it, on a decision by a Court within the Virginia jurisdiction. I have read many cases which I have followed under the key number 55(6), Mines and Minerals, in the "American Digest" system and the "Decennial" volumes which comprise a part thereof. I am sure that you are already familiar with the use of the "Decennial" digest as a means of following related cases through conclusions of law by the various courts of the United States.

The most helpful case in respect to difference of the conflicting rights of surface and mineral owners that I have been able to find is the case of Preston County Coke Company vs Elkins Coal & Coke Company (96 SE 973) (W. Va.). Unfortunately, in the consideration of any case we are limited to the brief digest of facts which are related in the opinion and are unable to tell whether proof and testimony given in the trial of the case are in point with testimony and proof in your case. We do not know whether the surface owner or the mineral owner had the better witnesses, or which of the two had better counsel, and what influence, if any, either of these two features may have had on the opinion handed down in the case.

I do not intend in discussing with you your rights or giving you an opinion thereto, to criticise either the proof offered or the counsel who represented you in the conduct of your case and its preparation for trial. However, all of the questions which I have considered lead me to one avenue of thought, that being that in order for you to have prevailed in your previous case, it was necessary for a mining plan to have been exhibited to the Court in a manner that would convince the Court that you could exercise your rights only by following the plan offered in proof. I have not read the transcript of evidence in your case, as you know. You have advised me, however, that no mining plan was introduced in evidence on your behalf.

Even with a mining plan, convincing as it may have been, the Court must still take into consideration whether

the rights which you propose to exercise under such plan can be exercised in a reasonable manner, that is to say, that such exercise by you will not abridge or destroy the rights reserved by the grantors, Bond, and later conveyed to Clinchfield. To make this point clearer, I digress briefly from the main issue to set forth a simple analogy of what ownership of land entails. The owner of the entire fee simple in land still owes certain duties to surrounding or adjoining land owners. For example, a person desiring to construct a building in a heavily populated area is under the restriction that the foundations for such construction must be put in in such a manner that support for any existing structure on adjoining land be adequately provided. This means that the owner is not permitted, even though he owns the entire fee simple, to arbitrarily and indiscriminately build improvements on his own land which do not consider the rights of the adjacent land owner insofar as protection for his own building is concerned.

This analogy is used only to demonstrate in some measure to you that however broad the grant of your mineral rights may be, they must still be exercised in a manner which will not abridge or destroy the rights that the surface owner has. This is true even though your mineral rights may have been granted to you prior to the conveyance of the remaining interests in the land to Clinchfield.

An objective approach to a consideration of these conflicting rights compels the conclusion that the surface owner also owes certain duties to the mineral owner, it being also implied by law that the surface owner cannot abridge or destroy the rights of the mineral owner. Your suit against Clinchfield decided by the U. S. District Court and affirmed by the U. S. Circuit Court of Appeals, has adjudicated, in my opinion, subject to such further appeal you are, or may be taking, that your rights as mineral owner have not been abridged or destroyed except as may have been decided by the Court. You cannot, therefore, in my opinion, arbitrarily decide that you wish to mine your coal and, without regard to the rights of the surface owner, take any steps for such mining as you, in your sole judg-

ment, believe necessary or expedient. If you do, you can be reasonably assured that Clinchfield will take appropriate steps to enjoin you from exercising your rights in such manner.

The next question to be answered, therefore, is under what circumstances can coal be mined from your tract. I do not believe, nor do I intend to suggest, that the decision in your case takes away from you your rights to mine coal. However, to safely do so it would appear that you must come up with a mining plan which will not abridge or destroy the rights of the surface owner, particularly with regard to improvements which have been constructed by the surface owner. Because of the considerable expense to which you have gone already in an attempt to find a manner of securing a construction of your rights through the Courts, I do not suggest that you go to additional expense for a further consideration of such rights unless, or until, that is the only method by which you can mine coal. Through the years there have been various negotiations which have gotten nowhere and I am firmly of the opinion that only through negotiations with the surface owner will you be able to exercise your rights which are the rights to extract from the land the minerals which are found on it. It may seem ridiculous to you that at the present stage you are advised that the rights which you possess are merely the rights in connection with mining minerals, for this you already know, and you have spent considerable time in the process of determining, or having a lawyer advise you, that you are right back where you started from. I have tried in considering your problem to be entirely objective in my thinking and to divorce myself completely from being sidetracked by any of the personal animosities which you have retained as a quite natural consequence of the losing cause. I know that you will immediately say that it is easy for an outsider to reach such a conclusion, but believe me when I tell you that this conclusion has been reached objectively in fairness to you.

Further, I understand that the underlying use to which you may want to put your mineral rights may be the transportation from Lower Bond to Upper Bond of coal mined on Lower Bond for processing on Upper Bond. In this connection, the use of Upper Bond surface for Lower Bond coal can only, in my opinion, be obtained with the consent of the surface owner and I do not believe that negotiations with Clinchfield would be fruitless in this regard. I say this even though I am not at all familiar with previous negotiations which have taken place with Clinchfield. Clinchfield, of course, is in the business of making money and it will expect a fair sales price for any rights which you may wish to obtain from it.

Leaving out for a moment a consideration of utilization of Upper Bond for Lower Bond coal—"What can you do in the event you are not able to negotiate with Clinchfield for mining of Upper Bond coal?" In this connection, I believe that you should employ an engineering firm to make a complete survey of Upper Bond for your use. At each step during the engineering survey, Clinchfield should be consulted to ascertain if the survey would in any way hamper its operations. If this is not done, you will find yourself back in Court, or, in more like prospect, you will find your engineering firm unwilling to continue with the survey. Should permission be refused by Clinchfield upon a request by you for survey work to be done where the survey work necessarily hinders Clinchfield operations, it will then be your prerogative to go to the Courts for relief. On the assumption that your survey should disclose that you can profitably mine coal on Upper Bond only by removal of improvements of Clinchfield, I believe that such removal should be anew a subject for negotiations, for should such removal not be negotiated you will again find yourself back in Court for its construction of your rights. The main danger here would be Clinchfield's plea of res adjudicata. I would not even attempt to guess what the Court's opinion might be on such a proposition, or what the cost of such litigation might be insofar as you are concerned. I do feel that Clinchfield would use every means

at its disposal, including the "smoke screen" weapon which you say was used in the previous trial, and that the expense of further litigation would far outweigh any value you may place upon the principle which you want upheld.

Your mineral rights do not, per se, give you any right to civil damages from a trespasser. This again is something that you have learned by bitter experience and I realize that a simple statement such as this is still upsetting to you. This leads me to comment briefly on the theory of continued trespass which you have asked me to consider. This, I believe, is the matter which you have discussed at some length with Mr. Michie, but I am unable in the cases to find any justification for an opinion advising you that you would recover in such a suit. This idea of continued trespass, as I understand it, is based upon Clinchfield's use of the open coal seam as a bed for tram facilities. You, of course, have the right, subject to the limitations already set forth above, to mine all the coal including the exposed area upon which the tram facilities are constructed, but again the exercise of your right to mine this coal is predicated upon such rights being exercised with due regard to the rights of the surface owner. In this connection, I must say that my original "horseback" opinion given you was erroneous, for at that time, as I recall it, I told you that I thought you could go in with a pick and shovel if you desired to dig up and remove the coal in the exposed seam. Whether I am right now, or was right in my "horseback" opinion, is of no consequence, for I do not believe that you should risk the litigation involved by an attempt to mine such coal.

You have had advice from earlier counsel with regard to your rights in securing from the Supreme Court of Appeals of Virginia a writ of mandamus and have also asked for my opinion with regard to your chances of securing such writ.

As I understand your problem in this regard, you wish to exercise this procedure as a means to secure revocation of the permit 30832-S issued by the Highway Commissioner

as a temporary permit for the change in location of secondary highway No. 632. The Supreme Court of Appeals of Virginia has original jurisdiction for the grant of such writ. The petition for the writ may be presented to the Supreme Court of Appeals at its courthouse in Richmond after reasonable notice has been served upon the defendant. The Court of Appeals may grant, upon such petition, a peremptory writ of mandamus against the State Highway Commissioner requiring him to perform ministerial duty. However, no mandamus can be issued, in my opinion, which requires the Commissioner to perform a discretionary duty.

This makes it necessary to consider whether or not the duty to be performed by the Commissioner, on the basis of your facts, is ministerial or discretionary in scope. In this connection, there are no Virginia cases directly in point but in cases somewhat similar decided by the West Virginia Supreme Court, I am led to the conclusion that the execution of contracts dealing with the acquisition of right-of-way and the acceptance or rejection of title acquired through such negotiations lies within the discretion of the State Highway Commissioner and that it would be within his discretion to determine whether any title so acquired was suitable for highway purposes. Hence, mandamus would not lie on the basis of your facts. In my opinion, the only possible relief available to you by mandamus would be to require the State Highway Commissioner to maintain the road at its original location unless or until such road was relocated or abandoned. I believe the plats which have been made available to me show definitely that the location of the road has been changed and the only question then to be answered is whether or not the proper procedure for such relocation or change was taken. The procedure for relocation or change does not, in my opinion, require any notice to you since road changes are normally concerned only with the surface owner.

Further, you have against you the finding of the Court that "Clinchfield's" improvements, operations and actions have not unreasonably restricted or prevented you from exercising your property rights on Upper Bond.

As to your questions with respect to your right to have the charter of C & O revoked, the revocation of its charter can be brought about only by action through or at the instance of the Attorney General of Virginia or the State Corporation Commission, the latter acting upon its own motion. As to whether or not you can compel the Attorney General to take action to revoke the C & O's charter, it is my opinion that such action would be in the exercise of his discretion and therefore not compellable by mandamus proceedings. This is in line with my view as to mandamus against the State Highway Commissioner.

Under date of March 29, 1956, I received a letter from Strother Hynes, Assistant General Counsel for the Chesapeake & Ohio Railway Company reading as follows:

"Since my letter to you of February 1, 1956, I have been advised by the Engineering Department that a check of all notebooks revealed no record of any piling having been driven on the Upper Bond Tract where it could interfere with any roadway or other construction you may contemplate."

In view of my findings and recommendations to you as contained in this letter, I am returning to you under separate cover, all of the papers and documents belonging to you and previously forwarded to me. All such papers which have been sent to me since the original large box was received, for your convenience, will be found in the front of the "Chesapeake & Ohio Railway Co." file.

My study of your files leads me to the conclusion that it would be worthless expense for me to go to Wise County either for an examination of the records there or to view the site of the Clinchfield operations as far as your land is concerned. There has been expended from your expense advance of $100.00, only $1.32 representing a long distance telephone call to you. This leaves a balance of $98.68 due you. While the hours I have spent in considering this matter have far exceeded the time which it was anticipated would be spent for a study of the matter, with the approval of Mr. Shewmake and Mr. Blackwell, I am also returning

to you $100.00 of the retainer fee which you sent along with the expense advance. Check payable to your order in the amount of $198.68 is enclosed.

I sincerely trust you will find benefit from the advice which I have attempted to give you in this letter. I am well aware of the fact that you have spent many years, possibly to the detriment of your health, in an attempt to succeed in this cause. I still believe that a bona fide intent to mine your coal coupled with a plan not destructive to the rights of the surface owner will eventually result in your securing all the rights which you are entitled to under the terms of your deed. The evidence of such intent may lead to negotiations with Clinchfield which indicate that a sale of your rights would be more beneficial to you in the long run than mining coal. It would certainly be my further advice to you that you secure the services of a reputable attorney acquainted with the area and a specialist in mining law to represent you in such negotiations.

Very truly yours,

GORDON H. ANDREWS.

GORDON H. ANDREWS.

GHA/dps

**Note: This Report twists the situations that I desired an opinion about, as in the continued trespass on page 134. I desired to know whether the surface owner can use the mineral owner's open coal seam for transportation purposes, as the Court awarded me nothing for coal in place. I desired to know whether a petition for a writ of Mandamus could require the State Corporation Commission to enforce the charter powers and force the railroad to acquire its right of way by law and require the State Highway Commission to force a Pertmitee after it relocated the road to produce the property in fee simple title by general warranty. It would appear from this Report that the Highway Commission itself desired and made the relocation.**

**Letter Dated April 4, 1956 to Charles E. Lawall, Assistant to the Vice-President of Chesapeake & Ohio Railway Co. Reply Dated April 11, 1956 to Mrs. Marjorie A. Mullins From Strother Hynes, Assistant General Counsel.**

April 4, 1956.

Chesapeake & Ohio Railway Company.
Charles E. Lawall, Assistant to the Vice-President.
Cleveland, Ohio.

Dear Mr. Lawall:

I tendered my check to cover trackage for the interstate shipment of 1400 acres of coal I control and all other additional coals that I may acquire from a plant site on your main line right of way on property known as the Upper Bond Tract. I have the physical means of reaching your right of way by Secondary Road 632 without having to acquire surface easements. This represents my civil rights from a common-carrier railroad; both Virginia and U. S. Civil rights allow me to lease from the railroad. You are injecting the words "additional right of way". My letter merely asked you to exercise your corporate powers and take your right of way by grant or condemnation, which is the way you are chartered under the laws of Virginia (your present right of way).

You are requiring me to provide my own plant site and right of way, yet you failed to similarly require the Clinchfield Coal Corporation to provide you with general warranty title for its plant site and right of way, in face of my protestations in February, 1948. Clinchfield has no surface rights sufficiently strong enough to deed to your railroad as you have had direct proof of because the Commonwealth of Virginia refuses to accept your deed holding under Clinchfield's weak title to surface easements in the residuum subject to my mineral rights in broad uses of the surface adhering thereto, for the road change.

If you will look up common law on the rights to use the surface in the residuum and in the light of the two deeds, mine the dominant estate and Clinchfield's the servient estate and let Mr. Strother Hynes, your general counsel brief you on this and cite cases in connection therewith, you will find that that not only have you exceeded your legal rights, but that you practically hold an easement to nothing. You nor Clinchfield have no legal right to receive, process and ship outside coals without liability to the mineral owner. By so doing Clinchfield is benefiting its adjoining coal properties and you are co-beneficiary. And co-tortfeasor in willfully negotiating to keep me from learning through natural and normal sources of this enterprise and allow me to enjoin the construction, the road change, the Mrs. Rausie Mead Condemnation, the illegal and tortuous removal of my Blair and Clintwood seam coal, violations of mining laws and the unreasonable and unnecessary use of your two surface easements, and failure to lawfully entitle your railroad to a franchise to operate and maintain this spur under Virginia Statutes. You *unlawfully* co-operated with Clinchfield to the fullest measure.

Mr. Gay failed to file the continued trespass case, and could not dispose of matters connected with and involving the Commonwealth of Virginia in a Federal Court but must file in the Supreme Court of Appeals of Virginia. Therefore and I have been legally advised since trial by numerous law firms that your position is not decided nor disposed of by this last case. Final judgment has not been entered because it is presently at Supreme Court level, and open at this moment. The most that case did decide was that there was room to mine Upper Bond Coal and due to no engineering facts being presented by Mr. Gay, the Court took for granted that there was room but as time goes on the Court will become embarrassed that it was duped into believing that sufficient space existed in and around and among Clinchfield's unreasonable and unnecessary installations which are today pre-empting my rights and destroying my right of alienation. The Court will realize that he failed to recognise a legal injury and abused his dis-

cretion in issuing an interlocutory Order for a More Definite Statement which went beyond the ambit of the complaint and allowed the Defendants to maneuver the Plaintiff into a vulnerable position. Clinchfield jockeyed for a position it could defend but only with lots of co-operation by my engineers and my attorneys. I say my engineers and my attorneys but that is the understatement of the year.

But then there will be many people truly embarrassed before my situation, my deplorable situation is resolved and my very valuable rights protected.

I am sure after Mr. Hynes' briefing that you will then understand why you must acquire "Wheelage Rights" from the mineral owner, if you desire to ship out side coal under Clinchfield's weak easement to surface rights in the residuum of this tract, and continue as you have been, if that is possible with my operation going on.

Under these circumstances and being put on notice by me of the unlawful use of your easement, which was all Clinchfield had to pass to you, that Mr. Hynes may deem it wise to halt your movement of their coal until the matter has been concluded between us. I heard that there was a work stoppage in the fall of 1946, during the very early construction period and it is now my impression that the State Corporation Commission and the State Highway Department was investigating the deed Clinchfield tried to pass to you and realized that my rights were going to be preempted and both you and Clinchfield were involved in an illegal enterprise and you both were put on notice of same. Will you advise me whether your railroad was put under notice along about August and September 1946, by these Departments and/or the Governor and the Attorney General?

Since I put no such condition that you acquire ADDITIONAL right of way, but rather that you exercise your corporate powers and follow your charter under Virginia Law and acquire your main line right of way by grant or condemnation, I am returning my check and request again that you put your railroad in the legal position of leasing

me a plant site and siding location contained within your present right of way. After all Clinchfield will not be there and cannot be there, and so I can have my dominant right to situate myself, where they used to be.

Very truly yours,

MARJORIE A. MULLINS.

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Letterhead of

THE CHESAPEAKE AND OHIO RAILWAY COMPANY

MRS. MARJORIE A. MULLINS,
305 Harrison Street,
Frenchtown, New Jersey

Dear Mrs. Mullins:

Dr. Lawall has referred your letter of April 4, 1956, to me for answer, since it deals with legal questions. My understanding of your letter of March 22, 1956, was the same as his, which he clearly stated in his letter to you of April 2d. With your letter of April 4th you have again tendered your check for $100.00, but have, as I understand you this time, made that tender upon two conditions—namely, first, that we agree to buy from you, or acquire from you by condemnation, the same right of way through the upper Bond tract which is covered by our deed from Clinchfield Coal Corporation, and, second, that we thereafter enter into a contract with you whereby we would lease to you for your proposed operation a portion of that land.

Permit me to make this final effort to get you to understand our position. You sued us in the United States District Court for the Western District of Virginia, and in that suit asserted, among other things, that we had exceeded our legal rights in occupying and using certain portions of the surface of the upper Bond tract which had been deeded to us by Clinchfield Coal Corporation, which portions of the surface you asserted a right to occupy with your own improvements, basing your claim upon the alleged superiority of your rights to those of our grantor. The Court

decided against you and you appealed and then dropped your appeal, thereby making the judgment final. In the same case you further litigated the right of Clinchfield to occupy and use that part of the surface which it was occupying, and you lost in the District Court on that issue also, and have more recently told me that your appeal to the United States Court of Appeals was decided against you. Thereafter you consulted other counsel and, if such counsel took the trouble to read the Court record in the above proceedings, you must have been advised by such counsel that neither the Supreme Court of Appeals of Virginia nor any other court has power to reconsider your claim that The Chesapeake and Ohio Railway Company is depriving you of any of your rights on the upper Bond tract. It follows that you cannot require us to acquire any additional rights on the upper Bond tract. Naturally we do not expect to buy or take by condemnation rights confirmed to us by the final judgment of a court of competent jurisdiction.

Your claim with respect to "wheelage rights" was also precluded by the judgment referred to. Clinchfield owned the surface and had deeded to us the surface rights we were, and are, exercising. You owned the coal and in your suit against us and Clinchfield you alleged that you had the right to occupy with your proposed improvements part or all of the space occupied by each defendant. Your rights to use the surface were prescribed by the terms of your deed, construed in the light of the established law of Virginia, and never extended beyond use of the limited portion of the surface reasonably necessary for mining, processing and loading the mineable coal underlying the surface of the upper Bond tract. Clinchfield, as owner, had the right to use all the remainder of the surface for any purpose for which any other owner can use his land. The final judgment of the Court in your suit established that neither Clinchfield, nor we as its grantee, had occupied any portion of the surface which you have a right to occupy. It is, accordingly, settled by said judgment that we are not hauling coal over any part of the surface which you have a right to occupy, and your claim with respect to wheelage rights is wholly without foundation.

As for your statement that you can locate your plant where Clinchfield Coal Corporation's plant now is because it will not be there when you get through litigating, that is a matter between you and Clinchfield, but it is premature to consider at this time where you intend to locate a plant after you get Clinchfield off the property, if you should succeed in so doing.

As to your statement that we unlawfully cooperated with Clinchfield, that is another claim you litigated in the suit above referred to. The final judgment of the Court denied your claim, as you surely understand, and I see no point to your continuing your *threats* to litigate that issue further. It is entirely useless to keep on answering your charges that we have exceeded our legal rights, or infringed any of yours, on the upper Bond tract. (Refuse to acknowledge my Civil Rights) without intending to be rude, but because no useful purpose can be served by continuing to make explanations of what I am convinced you must fully understand, let me respectfully suggest that it will conserve both your time and mine if you will discontinue your *threats* and confine further discussions to your plans, if any you have, to mine, process and load coal in a location not already occupied under rights that have been confirmed by final judgment of a court of competent jurisdiction.

If you are still convinced that you have coal to justify the expense of railroad installations to serve a mining operation on the upper Bond tract, and are interested in locating your proposed workings on said land in a place or places not inconsistent with the rights of others as adjudicated in the case above referred to, please let Dr. Lawall know where you propose to locate your mine opening or openings and your processing plant and its proposed capacity, and suggest a time or times when your representative can conveniently meet our engineer on the ground. Otherwise, please advise that you do not intend to do so, and we shall return your check.

Yours very truly,

STROTHER HYNES,
Assistant General Counsel.

SH.c

**Letters From E. Smythe Gambrell, President of American Bar Association to Marjorie A. Mullins, Dated March 6, and March 31, 1956, Replying to Her Letter of March 24, 1956.**

Letterhead of

AMERICAN BAR ASSOCIATION

March 6, 1956

Mrs. Majorie A. Mullins
305 Harrison Street
Frenchtown, New Jersey

*In RE: Thomas B. Gay, Richmond, Virginia*

Dear Mrs. Mullins:

The materials you sent to former President Loyd Wright were delivered to me. More recently I have received your letter of February 13, 1956.

This Association is interested in the improvement of law and the legal profession everywhere in this country, and lends its encouragement. However, it is impossible for the National Body directly to deal with specific complaints against lawyers in the thousands of localities in this country.

The Virginia State Bar Association and the Richmond Bar Association have presidents and they have grievance committees. It is my recommendation that, if you have a grievance against a Virginia lawyer, you take the matter up either with the State Association or with the City Association. In this connection, you are at liberty to employ any one of the hundreds of fine lawyers in Virginia to help you.

This Association does not have an adequate staff to directly handle such local complaints.

Yours sincerely,

E. SMYTHE GAMBRELL

ESG:mt

ROY L. MULLINS, M.D.
305 Harrison Street
Frenchtown, New Jersey

Telephone 33

March 24, 1956.

AMERICAN BAR ASSOCIATION
E. Smythe Gambrell, President.
The Citizens and Southern Bank Building
Atlanta 3, Georgia.

Re: Thomas B. Gay, Esquire.
Archibald G. Robertson, Esquire.
Robert P. Buford, Esquire.

Dear Mr. Gambrell:

I take decided offense to the tone of your letter to me of March 6th, in answer to mine requesting some special attention be afforded me by the Board of Governors in my effort as a citizen to expose one of the most humiliating and disgraceful and costly, fraudulent attempts to coerce me, by the sacrifice of my law suit, into selling to the Clinchfield Coal Corporation very valuable rights I own but which Clinchfield drastically needs in order to indemnify the Chesapeake and Ohio Railway Company and halt the railroad's abuse of its Certificate of Public Convenience and Necessity from the United States, by my own law firm Hunton, Williams, Gay, Moore & Powell, of Richmond, Virginia. It is decidedly unfortunate for the American Bar Association that Mr. Gay is a past president of this fine, distinguished Association but Mr. Gay's misrepresentation of my case to the Court and mishandling of my deplorable situation factually was voluntary on his part and that of the other members of this strong firm (supposedly). Believe me, when I say to you, that it was almost

worth the sacrifice of my case, to catch red handed not only the members of this firm but other supposedly high class firms and a Judge of a United States District Court on malfeasance, and other officials, in various departments of our Government.

When the person seeking assistance is told by the Chairman of the Legal Ethics Committee, as I was told to do by Mr. Drinker on March 9th, to "go home" and to "forget these rights" and find a hobby or "plant lilies, or something" and advised (without examining my deed in light of Clinchfield's deed and C. & O.'s violations) *that I had no rights*, I am wondering whether "This Association is (really) interested in the improvement of law" and whether the legal profession *everywhere* in this country *lends its encouragement*." I was satisfied beyond a doubt that Mr. Gay, anticipating that I would take my situation to the American Bar Association, enlisted the help of Mr. Drinker (his friend) to do his utmost to subtly talk me out of continuing to expose the *real legal activities* of his firm, even to the point of having Mr. Drinker suggest to me that I might make a money settlement with Mr. Gay. I read through Mr. Drinker's efforts and realized Mr. Gay's real worry was of Dr. Mullins' nephew bringing my case before the American Bar, because he happens to be one of the few fine Virginia attorneys your letter speaks of. There are some things that money won't buy, Mr. Gambrell and honesty and principle is one or two of those things. If I had not been a lady and if I had not become so emotionally upset from Mr. Drinker's contemptuous and sneering and decidedly cruel attitude toward me, for having only one desire or to save my property rights, that I would have told Mr. Drinker that I would certainly like to "plant a lily on a few attorneys I know."

Dr. Mullins was furious when I told him of that experience and I was so emotionally upset driving home, and that evening when I related Mr. Drinker's attentions to me, that Dr. Mullins joins me in our sincere request that Mr. Drinker be relieved of his position as Chairman of such an important committee, as in our opinion he is not a fit

person to be in charge because he has failed, in this case, to be impartial and "encourage the advancement to the legal profession." I realized that Mr. Drinker's embarrassment is acute but he has a duty to perform when he accepted the Chairmanship. I am hereby requesting *you* to also act impartially and present the "material" previously sent you, as well as this letter, to the Board of Governors and Dr. Mullins joins me in requesting Mr. Drinker's removal. Mr. Drinker's lips actually curled and the words hissed as he spoke out "that I thought all lawyers were CROOKED" and I protested and said, "No, that I knew there remained fine, honest attorneys," but he rudely interrupted me. I burst out crying because it seemed to me that his words lashed back and forth as a whip would be lashed upon the back of a slave driving them into submission. Mr. Drinker had not the common decency to say this in private but in his reception room for all to hear. He would not finish one question before he would "spit" another one and I think for a lady, a doctor's wife, a private school graduate, a woman of decency and refinement and honesty to have to take this *shabby treatment* from the legal profession in her heroic efforts to save her property rights, is a disgrace to this country and if I am soon not helped by this Association, I am going to the President, Mr. Eisenhower.

All my case amounts to is a violation of surface rights by these Corporations. Mr. Gay stated that when Clinchfield bought the surface of this tract, that they actually bought nothing, not for the purpose they bona fide intended using it for. Mr. Gay said that installations of this type and character and the general use of the property in connection therewith, and which they bona fide intended to continue, could be enjoined and that Mrs. Mullins through the Courts could require the removal of same. That was in January, 1951. He accepted employment on that basis, and then a month or so later gave it up. I am satisfied that Mr. Stuart (Clinchfield) and Governor Stanley requested Mr. Gay to withdraw, as all my attorneys are asked to do. But I think right then, Clinchfield and the State of Virginia

decided upon another type of strategy, or to conduct a "mock trial" and "whip me in Court" in an all out effort to COERCE me into selling these valuable rights. For Mr. Gay to put a lady through the rigours of a trial and five years of *pretending* to "prepare for trial" knowing I was to lose, and padding me for the shock by telling me in *advance of trial,* that I *would lose* and I felt that if that were really true, Mr. Gay would refuse to continue the case, so I decided that until he did so, that I had no reason *on my part* to halt the case prior to trial.

Mr. Gay explained that since Clinchfield owned *not one ton of coal* in the tract in question that they had no reasonable need for a coal preparation plant and facilities of that nature were unreasonable and unnecessary and Clinchfield was enriching themselves without liability to the mineral owner. He also later on discussed Mineral Law, as it pertained in my case and I enclose an excerp from a brief Mr. Gay presented to the Court. Judge Barksdale must have known there was a continuing trespass and was under orders not to give me relief in any form.

We the layman, can only look to the legal profession for help and through that profession to the Courts. We cannot file in behalf of ourselves. Likewise, we cannot satisfactorily bring to the American Bar Association's Legal Ethics Committee, the unprofessional handing of a case and the many ramifications involved in a law suit that is now commanding national attention. My case is not a "complaint(s) against a lawyer(s) in one of the thousands of localities in this country" as your letter to me of March 6th, inst. states.

Your letter also fails to include any mention of my original purpose in writing you, as President of the American Bar Association. Or my request that you take up with the Board of Governors of your Association, the matter of starting a precident and establishing a fund for worth while cases where the public has spent their entire cash savings of $100,000 in this particular case and even if she had additional funds over and above what is *still* required to fight on to save her rights, she could not afford to employ "one of the hundreds of fine lawyers in Virginia to *help*

(me) you." that you state "I am at liberty to employ" .... How I have desperately tried to get *help.*

In the first place, no fine Virginia firm will go against a fellow Virginian, much less a member of their own profession. Secondly, I've tried *already,* before and after, this case. I had three firms bought off prior to Mr. Gay and who damaged me by not enjoining the construction stage of this injury, so Clinchfield could later plead the Doctrine of the Balance of Convenience.

Right now, I have a new Virginia firm Shewmake, Gary, Goddin and Blackwell of Richmond whom I engaged in November 1955 to file for a Writ of Mandamus against the Commonwealth of Virginia and her State Corporation Commission and her Highway Commission, which was the remedy Mr. Gay suggested and which I thought my Bill of Complaint was advancing. Now, I learn that such a Writ must be filed for in the Supreme Court of Appeals of Virginia and not in a Federal Court. This railroad has never entitled itself to a franchise under Virginia laws to operate and maintain this spur, because the Railroad has not exercised its charter powers and taken its right of way (on my property) by grant or condemnation. In fact, since my 1500 acres of coal would be shipped *interstate,* the railroad is also violating its Certificate of Public Convenience and Necessity, or the laws enforcing the U. S. Constitution, governing railroad common carriers. C. & O. is in collusion with Clinchfield and refuses to become owner of its right of way on my property, because then I could force them to give me a plant site and siding for my 1500 acres of coal, and I also have the physical means of reaching the right of way from Secondary Road 632 without acquiring any adversely held surface.

Since November, 1955 to March 24, 1956, even though I have a ten year time limit expiring within which to file against the Commonwealth, and even though I have instructed this firm to take any urgent steps to protect me, and even though I have written for progress reports and my letters go unanswered, I am still not in receipt of their original investigative report and recommendations. Mr.

Gay in 1951 took two weeks *only* to advise Dr. Mullins and me in New York City of our rights in both these situations as I have above outlined. I am satisfied Governor Stanley is directing this new firm and that J. Lindsley Almond, Attorney General is side by side with the Governor.

Therefore, Mr. Gambrell, Dr. Mullins and I are placing our situations in your hands. Dr. Mullins also owns Min. Rts. on the LOWER Bond tract with the same injury, (legal.)

No. One concern is the halting of my freak case with the Supreme Court of United States where I have filed Notice of a Writ of Certiorari in behalf of myself while begging law firm after law firm to draw up the Petition. Time will expire April *2* and no Governor of ANY state should controll the legal profession and deliberately cause a Miscarriage of Justice.

No. Two is that Dr. Mullins and I request that the American Bar Association ask for an investigation by the Senate Judiciary Sub-committee into the workings of this case through the United States District Court at Abingdon. The irregularities of the officials of that court for the Fourth Western District, in addition to malfeasance by Judge Alfred D. Barksdale.

No. Three is that you advance to the Board of Governors my plea for legal assistance to bring this matter of Hunton, Williams, Gay, Moore & Powell's and Stathers and Cantrall's Clarksburg, West Virginia and now Shewmake, Gary, Goddin and Blackwell's employment to the Legal Ethics Committee, setting up a fund for the future, for worthy cases.

No. Four is that Mr. Drinker's attentions to me concerning private employment be investigated and a reprimand go forward to his firm and that in connection with his attentions to my Complaint to his Committee concerning Mr. Gay be thoroughly investigated from a standpoint of acting:

a. As a go-between in Mr. Gay's attempt to bribe me with money into not advancing this complaint and exposing

this firm's *real activities* or use of the *legal profession* to *victimize innocent* people who seek *help* through the Court.

b. As a go-between for the Chesapeake & Ohio Railway Company and Clinchfield in trying to talk me out of my belief that I have strong rights of great value, BEFORE he even investigated the legal aspects of my case, in light of the two deeds, and any legal injuries.

c. Mr. Drinker's unfitness to act impartially as Chairman of this Committee and my husband's belief that The American Bar would *at least* desire to have this Committee headed by a *gentleman.* By someone sympathetic towards those citizens who approach this committee for help. By someone honest, who will not use conferences to talk them out of their rights but "to go home and forget I owned this property" BUT am I to continue to pay Mineral Taxes to the State of Virginia while my rights stand pre-empted and my right of Alienation destroyed? While my State Civil Rights and my U. S. Civil Rights are denied me by C. & O.? While Clinchfield and C. & O. buy off my attorneys as fast as I can employ them? While these corporations and the Governor of Virginia are dragging the profession of law to the gutters? While Mr. Gay polutes every firm I employ after him with his whining for mercy from them so I will not realize what he has attempted to do to me? While Mr. Gay dares to bribe me through the Legal Ethics Committee Chairman? While these Corporations play loose and fancy with the United States Federal Court System?

I have heard it said that no man can win a case against the Clinchfield Coal Corporation and when I lost this case, which it was my perrogative to win in every aspect of it, this is a concrete example of why they win every case, and how they get by with it.

Clinchfield is using the Courts to their advantage. What Judge would write an order for a more definite statement which required the Plaintiff to go go outside the ambit of her Bill of Complaint and allow the Defendant's to maneuver the Plaintiff into having a present intention of mining her coal (or forcing her to exercise her rights in order to pro-

tect them under F. R. of C. Procedure Rule 12 (e) by requiring her to present the Court with a bona fide mining plan which it was humanly impossible for her to do, while the defendants remained unlawfully pre-empting her rights and while her right of alienation remained destroyed and her ability to get a leasee or operator-agent to survey out such a plan.) What Judge would then decide against her stating that he was satisfied that she never had a bona fide intention of mining her coal because she failed to file such a plan. What Judge would write an *absolutely false* set of Finding of Fact. What Judge would pick out one sentence in a letter and use it to decide against her, when that sentence, if published within the entire text of that letter, and further considered in light of the Defendant's letter to her just proceeding that which actually provoked the very statement she made (without counsel to guide her because they "bought off" her counsel) and would further fail to consider both these letters in light of the oral conference between the parties which would prove conclusively that Clinchfield's negotiations were not conducted in *good faith* and actually *provoked* the very statement Judge Barksdale picks out and sets apart and uses so cruelly against her.

I have reason to believe that there are two sets of official documents filed with the Deputy Clerk and that the Court Reporter is under Clinchfield's direction. I have concrete proof of this and also ficticious documents are filed by the railroad with the Interstate Commerce Commission and there may also be two sets filed there. One true set and one for Mrs. Mullins when I write the Clerk or Department heads.

I hereby placing myself in your hands. I need really big help, if I am to save my valuable rights and I need it fast. Will you help me?

Sincerely and respectfully yours,

MARJORIE A. MULLINS.
Marjorie A. Mullins.

Letterhead of

AMERICAN BAR ASSOCIATION

March 31, 1956

Doctor Roy L. Mullins
305 Harrison Street
Frenchtown, New Jersey

Dear Doctor Mullins:

Your letter of March 24 has been received.

As I stated in previous correspondence, I am not in position personally to go into your problem and must direct you to the good lawyers who live in your neighborhood and in the State of Virginia.

Thinking that the papers you sent me may be of value to you in your file, I am returning them herewith.

Very truly yours,

E. SMYTHE GAMBRELL

ESG :ps
Enclosure

**Letter Dated September 17, 1950 to Clinchfield Coal Corporation (Not Filed During Trial) Negotiating for Wheelage Rights. Letter in Reply Dated October 3, 1950 From Clinchfield Coal Corporation. Exhibit 120.**

Letterhead of

DR. MULLINS PRIVATE HOSPITAL
Frenchtown, New Jersey

September 17, 1950.

The Clinchfield Coal Corporation,
Dante, Virginia.

Dear Mr. Mathews:

I would like to negotiate with you for wheelage rights to bring the Lower Bond Coal over your intervening J. R. Mead Tract, for preparation and shipping. It is only a quarter of a mile haulage. This is in addition to the negotiation for the same privilege on the Sarah J. Hutchinson coal requested in my last letter you and which I have received no definite reply.

Very truly yours,

MARJORIE A. MULLINS.
(Mrs. Roy L. Mullins.)

Letterhead of

PENN, STUART & PHILLIPS

October 3, 1950

MRS. MARJORIE A. MULLINS,
305 Harrison Avenue,
Frenchtown, Pa.

Dear Mrs. Mullins:

On my return to my office today I find your letter of September 18th to Penn, *Stewart* & Phillips and your letter of September 17th to Mr. Matthews which he has referred to me for reply.

Referring first to your letter to me of September 18th, the small sketch map which you attached does not purport to show, and indeed is on too small a scale to show, proposed locations of roadways to the proposed sites of the four drill-holes which you plan to put down on the Upper Bond Tract. With respect to the locations of the four drill-holes, you have indicated these by dots made by red pencil on the sketch map. We see no objection to these locations.

It is not practicable for Mr. Huffman to locate on the sketch map any suggested locations of roadways to the proposed sites of the drill-holes. Not only is the sketch map on too small a scale, but as pointed out in the last paragraph of my letter to you of September 8th, these roadways will have to be located upon the actual ground by discussion between your contractors and Mr. Huffman. There should be no difficulty about reaching an agreement in this way upon the locations.

Replying to your letter of September 17th to Mr. Matthews, I see from it that you would like to acquire haul-through rights over Clinchfield's J. R. Meade tract so that you can move coal from your Lower Bond tract and also from your Sara J. Hutchinson tract (which I now under-

stand is a separate tract from your Lower Bond tract) to the Upper Bond tract for preparation there. It seems clear to us that it would not be in the interest of either Clinchfield or yourself to take any steps which would increase the surface activities on the Upper Bond tract, with corresponding increased need of surface space. For this reason Clinchfield would not be willing to grant you the right to bring on the Upper Bond tract coal mined from the other two tracts which you mention. However, as suggested in my letter to you of September 8th, Clinchfield would be willing to negotiate with you looking to your acquisition of rights on Clinchfield's J. R. Meade tract which would enable you to transport your coal mined on the Upper Bond tract across the J. R. Meade tract for preparation on your Lower Bond tract. It seems clear that such an arrangement would greatly benefit your own operations by enabling you to locate your preparation plant at a more central and accessible point with respect to all the coal on your three above mentioned tracts. At the same time it would eliminate your apprehensions as to the conflicts which you have been claiming would result from carrying on both your and Clinchfield's preparation activities on the Upper Bond tract.

Yours very truly,

WM. A. STUART.

WAS:aag

## Letters Dated March 26, 1956 and April 11, 1956 From General Services Administration to Marjorie A. Mullins.

Letterhead of

GENERAL SERVICES ADMINISTRATION

Date: March 26, 1956
In Reply Refer to: 6RCSR-1

Marjorie A. Mullins
305 Harrison Street
Frenchtown, New Jersey

Re: Anthony, Grace V.
DOB 1-20-04

• • • • • •

XX Grace V. Anthony, DOB 1-20-04 was employed by the Federal Government as follows:

From 2-6-51 to 8-14-53 by Treasury Department, Washington, D. C.

Final designation: Cash Accounting Clerk, $2910 per annum. Reason for separation: Displacement.

The records indicate that services and conduct were satisfactory. There is no derogatory information on file. Records show that Mrs. Grace V. Anthony held the same position throughout the above period of employment.

M. D. DAVIS,
Chief,
Reference Service Branch.

sjn/ba

Last known address as of 8-14-53 was 56 Quincy Place, N. E., Washington, D. C.

Letterhead of

GENERAL SERVICES ADMINISTRATION

April 11, 1956

In Reply Refer To: 6RCSR

Marjorie A. Mullins
305 Harrison Street
Frenchtown, New Jersey

Dear Madam:

Your letter of March 27th requests information concerning the former employment of Mrs. Grace V. Anthony, and other information.

We have examined the employment records in our custody and can find no evidence that Mrs. Anthony was at any time employed by the U. S. Courts.

We are unable to answer the other questions posed in your letter.

Very truly yours,

S. D. WESTON
for M. D. Davis
Chief,
Reference Service Branch

**Correspondence (in part) Between Hunton, Williams, Anderson, Gay & Moore and Marjorie A. Mullins from June 19, 1953 to April 12, 1954.**

Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE

File No. 11,609

June 19, 1953

*Re:* Marjorie A. Mullins *v.* Clinchfield Coal Corporation *et al.*

Mrs. Roy L. MULLINS
15 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

As I told you shortly before I viewed the property in Wise County with you and Mr. Evans, I had to do so at that time because of the pressure I knew would be upon me during the latter part of May and until after the 10th of June. I therefore have not been able properly to consider your letters of May 20th and 21st until the last few days.

You realize, of course, that there is a great deal of factual matter in these communications. Some of it may have a material bearing upon what I think presently should be done in the above matter, and I therefore wish to have a reasonable opportunity carefully to consider your suggestions and make such further inquiries as may seem to me to be proper and helpful.

When I returned from Wise I was quite satisfied with your conclusion that you should not accept the report of the engineers and the recommendations contained therein, but concluded not to advise you definitely of this view or recommend that it be communicated to counsel for Clinch-

field and the C. & O. until I had had the opportunity again to review your voluminous correspondence with these companies, Cadell & Company engineers and others with whom you have corresponded. I wanted to do the latter so that in my communication to counsel for Clinchfield and the C. & O. I could state that the advices which I was then giving you were based upon a review of these files and a personal inspection of the premises, and that I was advising you as an attorney, not to accept the engineers' recommendations.

I want to assume this responsibility if I feel justified in doing so, as I am reasonably certain I will, and not put the rejection of the engineers' report upon you. Both Mr. Stuart and Mr. Hynes feel, I think, that you are disposed to reject any engineers' recommendations and I therefore want these gentlemen to feel that our final attitude in respect to the report is based upon my legal recommendation to you, and not upon your personal judgment.

I will let you hear from me further in a few days.

Sincerely yours,

THOMAS B. GAY

12:10

NOTE: By letter I advised accepting joint recommendation and molding it into an operational plan to include all the coal I controlled.

Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE

File No. 11,609

July 2, 1953

Re: Marjorie A. Mullins *v.* Clinchfield Coal Corporation et al.

MRS. ROY L. MULLINS
15 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

I spent most of last week critically reviewing your correspondence, maps and other documents with reference to the above matter, and we have conferred at considerable length with reference to it during Monday and Tuesday of this week and until noon yesterday. As a result of these considerations and in the light of my recent visit to the property in company with you and Mr. Evans, I advised you that in our opinion you were not justified in accepting the recommendations of the engineers, Messrs. Evans and Alford. I so advised Messrs. Stuart and Hynes on yesterday, sending you a copy of my letter to those gentlemen. I also forwarded to the Clerk of the Court at Abingdon a statement of the further particulars of your claim as required by Judge Barksdale in his order of December 1951. This statement was prepared during the course of our conference and I understood had your approval.

While I unhesitatingly advised you that in our opinion you should not accept the report of the engineers, I also advised you that I felt further efforts should be made at this time to settle the case without a trial. My reasons for so advising you are briefly these:

1. This is a suit in equity in which we are asking for a mandatory injunction compelling Clinchfield to demolish and remove its tipple and other improvements or so to relocate them as to enable you economically and efficiently to mine and market your coal. We are also asking for compensatory and punitive damages. I apprehend that the Court will be very reluctant to enter a final decree compelling Clinchfield to demolish or substantially relocate its tipple and other improvements, representing an investment of what we understand to be about a million and a half dollars, in order to enable you to avail yourself of your rights to mine and market coal which does not have a present value in the seam and/or when mined and prepared for market in excess of $100,000. It seems to me the Court is likely to dispose of the case in one of two ways, first by compelling Clinchfield presently to compensate you for the full worth of your property, or to give you an election to work out a compromise under conditions which would permit Clinchfield to continue to use its facilities as presently located and at the same time enable you to remove and market your coal in a reasonably economical and efficient manner.

If the Court decided to do the former, that is, award you a lump sum in damages, it would probably give Clinchfield the election of either paying that sum of money or removing its facilities. I do not think there would be any doubt as to which of the alternatives Clinchfield would elect. I am sure it would pay the damages as determined by the Court.

If the Court should take the other view of the matter, that is, indicate the general basis of what it felt would be an equitable compromise of the rights of the parties, we would be left substantially where we are now. And it was with this thought in mind that I suggested we presently consider a proposal to Clinchfield somewhat along the following lines:

(a) That you be permitted to open up the Clintwood seam on the south slope, construct a tramway running

along either side of Clinchfield's coal dump, and remove and dump your coal through its facilities, having joint use of its tram tracks where necessary for this purpose. This would enable you to mine the coal on the south slope. As a basis of trading with Clinchfield, I would propose that we sell them the coal at the dump, they treat it, ship and market it and account to you for the proceeds of its sale on a monthly basis at the average price obtained for their coal during any current month. If they rejected this proposal, I would be inclined to advise that some reasonable sum per ton be paid them on account of their expense for treating, shipping and selling the coal. Such an arrangement would contemplate your right to dump your slag either at their slag dump or over the side of the tram tracks on the south slope.

(b) The mining and marketing of your coal on the south slope might be taken care of by a plan somewhat along the lines recommended by the engineers, except that you would have definite and fixed roadways, and Clinchfield would be required to give you legal easements over the surface of the land for this purpose, with suitable provisions for your slag and other dumping and treatment needs. A tipple for the treatment of your coal might be located in the manner suggested by the engineers, or if you prefer, and I think this would be more advisable, on the Lower Bond Tract, where you could arrange your own sidetrack facilities without interference from Clinchfield and the hauling of coal in trucks from *your other properties* would be materially shortened.

The foregoing is of course a very rough outline of what I believe should now be put forward as a basis for a compromise settlement. I understand, however, from our discussions that you are unwilling to proceed in this manner, but wish the case prepared and brought on for trial as soon as this can reasonably be accomplished.

With this in view we prepared and filed the statement particularizing your claim.

2. In view of your election not to pursue settlement negotiations further but prepare for trial, I reiterate what I have on a number of occasions undertaken to stress as the probable disadvantages to you of such a course of procedure. They are briefly as follows:

(a) It will be impossible to bring this case on for trial before the fall term of the District Court at Abingdon, possibly not until the spring term in 1954, depending upon the progress we make in developing the necessary engineering and other factual data. It is reasonably certain that the losing party, whether the plaintiff or the defendants, will take an appeal to the Circuit Court of Appeals. Such an appeal would not be heard, if the case is not tried in the lower court until the spring of 1954, until the June term of the Circuit Court of Appeals at Asheville, North Carolina, and we would not likely have a decision from that Court before September of 1954.

(b) The actual cost of the litigation will I fear greatly exceed the value of a favorable outcome to you, having regard to what we may believe will be the *defendants' testimony* as to values, the conflict likely to arise on that subject, and what a judge or a jury might find in view of this conflict of evidence.

I gave you on yesterday a statement of our accrued office time costs in this case to June 26, 1953, but I think you will find from the slip of paper which you said you wished to show the Doctor that it contained an error in addition. The total should be $10,955 instead of $11,000 (odd) which I footed up as the legal fees to date. There are approximately $500 in costs in addition to this amount.

In addition to the foregoing, I believe there will be at least $10,000 additional costs in attorneys' fees, engineers' fees, fees of other experts, photographic costs, etc. I am estimating roughly that our own fee would approximate $5,000 in addition to what has thus far been incurred. It might be less or might be more, depending on the time consumed and to some extent at least on the outcome of the trial, as we would of course feel justified in asking for some

special compensation over and above *per diem* costs in the event we had a highly favorable outcome of the trial.

If the case went against us in the District Court and *you wanted to appeal,* there would be the cost of preparing and printing the record, the briefs, etc., and the argument of the case on appeal. I would say this would run around another $3500. If we were successful the cost of printing the record and the briefs would be recoverable from Clinchfield, and our fee for arguing the appeal would be somewhat larger than that which it would have been had the result been adverse to your interests. I am sure you understand that the foregoing figures are merely estimates, but I do not think you could expect to come out of the litigation at a cost materially less than the amount stated. It might be substantially more.

I understood you wished to discuss this aspect of the matter with Dr. Mullins and I shall await your further advices.

You have forwarded us on account thus far $4250. If it is convenient for you to do so, I would appreciate your sending us a check for $2500 at this time as a further payment on account.

Sincerely yours,

THOMAS B. GAY.

12-10

NOTE: Suggestion A & B are contradictory to page 1, paragraph 2.

ROY L. MULLINS, M.D.
305 Harrison Street
Frenchtown, New Jersey

Telephone 33

July 7, 1953.

THOMAS B. GAY, Esq.
Hunton, Williams, Anderson, Gay & Moore.
Electric Building
Richmond, Virginia.

Dear Mr. Gay:

Your statement to me in paragraph 3 of your letter of July 2nd, " . . ., in order to enable you to avail yourself of your rights to mine and market coal which does not have a present value in the seam and/or when mined and prepared for marketin excess of $100,000." is the keynote which accounts for our difference of opinion. Let me say that up to this point I am in accord with all your primary acts of handling, opinions and logic and ect.

But I do believe, most sincerely, that you should clarify for me or I for you the factor in our thinking that causes you to feel obligated to stress that I should settle out of Court, while my contention remains as always, that no-one even you, will ever bring the Clinchfield Coal Corporation to terms without the adjudication of my rights behind us and if favorable standing over Clinchfield's head.

If I had to outline my case or brief my case in the order of deprivations as well encroachments by *importance*, I would start with No. 1 as follows:

1. The deprivation of bringing foreign coals for preparation and market due me by virtue of the C & O right-of-way (whether 150 ft. or 350 ft.) running through my tract along with Secondary Road 632

transversing C & O's right-of-way which allows me opportunity to cross from a public road on to and within their right-of-way.

A. This deprivation is caused by C & O illegally moving creek and road north 33 ft. Deeds of exchange with Highway Dept. unacceptable.

B. By acquiring an easement from Clinchfield which because of my prior rights to certain uses of the surface under my deed to mining rights, Clinchfield could not legally give an easement to.

C. By C & O placing five side tracks upon this easement and leasing same to the Clinchfield Coal Corporation for shipping of foreign coals.

2. The construction by the Clinchfield Coal Corp. of a preparation plant astride these side tracks which further deprives me of my prior right to the same under the C & O right-of-way as well as my own deed to use the surface for coal preparation.

A. Accomplished by cutting toe of slope and ect.

3. The illegal removal of tons of Clintwood Seam Coal by The Clinchfield Coal Corp.

4. The encroachment upon and over and through my Clintwood Coal Seam by the three (four) tram tracks placed there by Clinchfield.

5. Oxidation and streaking balance of remaining coal seam.

6. Loss of favorable years for coal marketing or sales.

7. Creation of filtering pools and refuse dumps upon the north slope.

(There is no end to the lesser details that would fall under these numerals and letters.)

Number one would make my damages run far in excess of $100,000. But again whether I make $100,000 on my Upper Bond Coal or $200,000 on public coals is not established figures and I agree with you in one of you very early letters that no Court will decide damages bases on *probable* profits.

Therefore the Court if it awards damages and gives Clinchfield the alternative of moving off or paying same, has to arrive at the damages in some other fashion. To help the Court is the already established tonnage of coal prepared and marketed by Clinchfield from the start of the encroachment as well as the freight records through the I. C. C. again establishing the profit C & O made on the shipping of this same tonnage.

The factor that establishes the value of any property is the amount of business that will be done from that location and the profit resulting. Where the Waldorf Astorior now stand was land of simple values many years ago when Father Knickerbocker first saw it. What makes it valuable to-day? The business that is conducted upon it. Naturally there must be a stopping point. A reasonable royalty these Defendants can pay and continue to realize a profit themselves. Not some prohibitive royalty which would put them out of business and the plaintiff left with nothing.

Therefore Judge Barksdale with Clinchfield's and C & O's annual financial stockholders reports or their income tax reports and your eloguent persuasive powers must decide the amount. I hope it will be 10¢ from each. But these reports might be mis-leading in the sence that the first years of an operation are usually not profitable years.

Please feel free to correct me if you think I am wrong in my thinking on this matter and you may have to look up some law on it (have it looked up, I mean) in order to convince me I am wrong on my public dock rights under C & O. I can be very dense at times. But please construe this to be just interesting discussion between us with both having respect for the others opinion and willing stand corrected on all or parts of it.

To discuss further your compromise plan, I have been working up a brief on its good and bad points and the bad exceed by far the good and truthfully I think it would be detrimental to make it as a suggestion because it would show that you and/or I do not understand practical and economical coal mining. I think it is up to Clinchfield to make any settlement proposal plans, after all they are being sued not me.

IMPORTANT.

Under some public body either federal or state, a railroad is granted permit on the right-of-way authorized or to be authorized on the dedication day. (This I learned from the I. C. C. I thought it was the State Corporation Commission. I am still not convinced it is not connected to that commission but not under taxation Dept.)

Could it be under Public Safety? Since Dr. Mullins statement that railroads very definitely do take slope which have been cut into at the toe of same thereby causing ledges, cracks, slides exposing roots of trees and ect. do control the safety of their tracks and personnel and the public, it would seem logical that the railroad's original intention was to take in that slope behind the tipple.

They can then stake it, plant it to, control the slides, remove dead trees, rocks cracked ledges and drain it so as to prevent wash out to their tracks below.

Some Public Body must be interested in the width of right-of-way the percentage of grade for the tracks, the percentage of curve for the tracks, slope control, drainage pipes installed under the tracks and tunnels, approaches, road grades crossings, electric crossings, telephone crossings, balastering, compensation, bridges and ect.

Therefore the certificate just gives the railroad the right to condemn land and the permit takes care of the right-of-way and construction placed upon same, when the railroad dedicates the land it has bought or condemned for public use. That right of way must be authorized and then a permit issued to operate over it.

You have connections with other railroads and through them you might be able to learn the continuity of procedures necessary before a railroad can operate over the finished spur, either through the railroad's engineer or their legal Dept. We will have to be thoroughly familiar with workings of a railroad as well as a coal operation.

On August 1st, I will send a check to cover your requested payment of $2,500 if this is satisfactory to you.

To get back to whether we should go to Court, I disagree that the Court would recommend one man settling his case by recommending that he go down on another man's property. (Lower Bond) No deed is worth the paper it is written on if that could be the case. Secondly suppose I did agree to go there, and a divorce ensued, the settlement is useless. Furthermore the coal owner on the lower tract can prepare for market on the 180′ wide right-of-way where Clinchfield load tracks are now presently installed and that coal owner can dump slag as well on that surface for his own lower tract coal and to my way of thinking, to ever entertain an idea of going down on the Lower Bond Tract is ridiculous. Too crowded.

If Clinchfield wants me on the Lower Bond Tract they would have to pay me to move down there and before they can do that the coal owner on the Lower Bond Tract would have to quitclaim all his interest in the tract (surface of the tract).

This case has got to be dealt with on the Upper Bond Tract alone. Even if Clinchfield gave me complete title to another tract, in the eyes of the law, Clinchfield is still guilty because if not then a man's deed means nothing. Just as I told you in the case of your very own farm. The stronger man would force the weaker man to swap deeds.

I have pleaded my case, Mr. Gay in just a pleasant matter-of-fact way. Please correct my thinking if I am wrong.

Very truly yours,

Marjorie A. Mullins.

Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE

FILE No. 11,609

July 8, 1953

*Re:* Marjorie A. Mullins *v.* Clinchfield Coal Corporation et al.

MR. J. C. CODELL, JR., President
Codell Construction Company
Winchester, Kentucky

Dear Mr. Codell—

I beg to refer to our telephone conversation about the middle of last May, in which I undertook to arrange to have you meet Mrs. Roy L. Mullins and me upon a tract of coal land which she owns in Wise County, Virginia, and upon which Clinchfield Coal Corporation has constructed and is now operating extensive mining facilities. I understood from one of your associates that circumstances had arisen which prevented your making the trip, and Mrs. Mullins informs me that she later talked with you in a general way about what we had in mind in asking you to meet us upon the property.

Mrs. Mullins informs me that she presently has every intention of mining her coal if it can be determined in the pending litigation that her mineral rights are such as would enable her economically to do so. Mr. Cadwallader Evans, Jr., and Mr. Newell G. Alford were appointed about a year and a half ago to study the problem and make recommendations as to how Mrs. Mullins might operate on the property. The report which these engineers have submitted apparently assumes that Clinchfield Coal Corporation had the prior right to place improvements upon the premises and thereby prevent Mrs. Mullins from

placing her mining operations and preparation plant in the most desirable and economically feasible location. In our opinion Clinchfield Coal Corporation had no such right and we therefore unhesitatingly advised Mrs. Mullins not to accept the recommendations of the engineers as the basis of settlement of the litigation.

I have carefully reviewed your prior study of the property and estimates of costs of possible location of her tipple, sidetracks and other facilities and understood from these that your construction and engineering judgment is that the most feasible and economical location is that now preempted and occupied by Clinchfield.

Mrs. Mullins advised me that in her telephone conversation with you, you were good enough to say that you would testify at the proper time in support of your report, and the purpose of this letter is to advise you that we are now taking all proper legal means to bring the case to trial at an early date. Prior to the actual trial I hope I may have the opportunity of conferring with you with the thought of developing such testimony as you may feel disposed to give in support of Mrs. Mullins claims.

Very truly yours,

/s/ Thomas B. Gay

12-10
cc—Mrs. Mullins

Note: Mr. Gay refused to subpoena Mr. Codell as well as State Highway and State Corporation Commissioners.

Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE

File No. 11,609

July 8, 1953

*Re:* Marjorie A. Mullins *v.* Clinchfield Coal Corporation *et al.*

Mrs. Roy L. MULLINS
13 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

I have yours of the 5th, and in reply beg to advise you as follows:

1. As suggested, I have written Mr. J. C. Codell, Jr., President of the Codell Construction Company, Winchester, Kentucky, and enclose copy of my communication of even date. It does not purport to develop our possible use of him and the facilities of his company, either prior to or during the course of the trial of the case, as I understood you were in agreement with me that it was inadvisable to do so at this time, notwithstanding the suggestions which you made in this connection in your letter of May 20, 1953. I will advise you promptly of Mr. Codell's reply.

2. I had no difficulty in locating your letter of July 26, 1951, sending us your Henry C. Bolling file, which seems to have been initiated by a letter from Mr. Bolling to you of March 17, 1947, and is concluded with a letter from Mr. J. L. Cambles to you of September 15, 1950. The file was placed on a permanent back upon its receipt from you and braddied with a heavy brass staple. There are blue sheets inserted in the file, separating it by years, and I think you

will find it intact in the form in which it was sent to us. I believe it would be advisable for me to retain it for the time being as it may contain some information of a collateral nature which will be helpful in the preparation for the trial of the case.

3. I am glad to say we have located the original letter from Mr. Walter Lee Rush, Land Agent of Clinchfield, to Dr. Mullins, dated November 10, 1945, to which is attached a blue print bearing the legend "C. C. C., Dante, Va., November 1945. V. F. Bond 96.50 Acres. 1 inch=400 feet."

The only helpful statement in this letter is to the effect that Clinchfield has "calculated that you have 19.99 acres of mineral on the right side of the creek and 33.98 on the left side." It goes on to say that it is doubtful whether you have any minable coal on the left side and that the coal on the right side appears to be of doubtful value because of the thinness of the seam. This letter and the accompanying blue print (letter since) is marked "No. 1" and evidently was intended to be the first document in your Clinchfield file. It was found in a folder marked "Technical Information."

4. I have written Messrs. Boggess & Coates, Attorneys at Law, Tazewell, Virginia, whom you state represented Mr. Ashley operating as the Letcher County Coal Company, at or near Jenkins, Kentucky, requesting that they refer me to the decision or decisions upon which you state they successfully relied in conducting certain litigation, and enclose copy of my letter for your information.

5. I note that Dr. Mullins "definitely feels" that you "should have an adjudication of the mining rights" and that you would therefore like me to include (I assume in the scope of the litigation) the question whether your deed carries the right to strip-mine. This question was discussed at some length in the original memorandum of law submitted to you by Messrs. Steptoe & Johnson, in which they

reached the conclusion that (1) "Mrs. Mullens does not have strip-mining rights on Tract No. 1; (2) she has only minimum depth mining rights plus a waiver of damages to the surface and water courses * * *" In a later memorandum dated April 3, 1950, which I find in your Steptoe & Johnson file they again review this question. The author of this supplemental memorandum says he has "checked the authorities [on this point] again and finds nothing new to add to what has already been said * * *"

I find on page 17 of the original Steptoe & Johnson memorandum a notation by you to the effect that "Clinchfield persistently states over and over that my coal can't be mined mechanically because of bad roof and floor conditions—if this is true—can't I strip it?" I think it fair to say that the answer to this question may, in the light of the language of your deed, be subdivided into two parts, namely, (a) those rights *pertinent to the grant of the mineral itself* which will be *implied* therefrom even if not specifically set forth in the deed and (b) those rights derived from a construction of the language used in the deed. As to the former, Steptoe & Johnson rely upon *West Virginia-Pittsburgh Coal Co.* v. *Strong*, 42 S. E. 2d 46 (1947), and *Baker* v. *Mintz*, 215 Pac. 534 (Colo. 1923), in support of the view that the right to strip-mine is not generally or ordinarily *implied* from the grant of mineral rights. In my subsequent investigation of this point I found the case of *Commonwealth* v. *Fisher*, 72 Atl. 2d 568 (Pa. 1950), where it was shown that, in order to excavate the coal strip-mining had become essential. If, as you state, Clinchfield contends that the coal on your land cannot be mined mechanically because of the bad roof and floor conditions, the *Fisher* case would seem authority for your right to strip-mine. The Court did not in that case, however, appear to rest its conclusion *solely* upon this factual condition. The deed gave the owner of the mineral rights "full, entire, complete and exclusive ownership" of the coal "in or upon any part of" the land, with the right to "dig, excavate, or penetrate any part of the said premises." It was held that strip-mining was proper since

it constituted no limitation upon the methods to be employed in mining the coal. The Court also held that the right to subjacent support was impliedly waived, although there was a strong dissent on this point.

In view of the language in your deed exonerating you from "liability for damages to the surface, or anything thereon" I incline to the view that you do not owe Clinchfield the right of subjacent support and, on this point, Messrs. Steptoe & Johnson appear to be of the same opinion.

I am not advised as to the custom and usage in respect to strip-mining in Virginia coal fields but if this is a common practice the language of your deed might be construed impliedly to confer the right. In any adjudication of your rights, I would certainly take care to see that the issue of strip-mining is raised and determined, if possible in your favor.

6. You state that I expressed the opinion that you had to leave subjacent support for the balance of the surface under which you may tunnel-mine. You do not state when I made this statement, but if you are under the impression that I entertain any such view I certainly wish to correct it here and now. What I have said in the discussion of item 5, *supra*, indicates my reason for feeling that you probably do not have to leave or provide subjacent support.

7. You also quote me as saying that I feel "satisfied that the wide 350-foot right of way (at the point of the tipple) was only a working line, that no railroad would undertake to include in its right of way a slope." You certainly misunderstood me in this connection. I began my career on an engineering party and have been through all forms of civil engineering incident to the recognizance, location and construction of railroad rights of way. No prudent engineer would design or construct a right of way through hilly country where cuts and fills have to be resorted to without providing adequate slopes on each side of both the cuts and fills to prevent slides. The usual ratio is 1½ to 1. What I said and what you apparently

misunderstood was that in view of the nature of the terrain —it is almost solid rock—I did not think Clinchfield *had any need* to acquire a right of way to provide a slope in the rear of the tipple. The rocky formation is so solid that instead of a sloping away from the roadbed in the rear of the tipple, there is actually a rocky overhang, and I confess to experiencing some uneasiness wher walking under it as there seemed to me to be very present danger of a slide from vibration emanating from the tipple, or the shifting and movement of railroad cars.

8. The element of chronolgy can be developed to some extent in such questions as we may determine to embody in interrogatories to the defendants, but I am generally speaking more concerned over the subject matter to be developed than in the chronolgy of its occurrence.

9. I note that both you and Dr. Mullins have "given open-minded and serious thought" to my settlement suggestion and that you both "independently agreed that it was not workable." I therefore feel that I have fully discharged my professional responsibility to you in that connection and shall henceforth devote myself actively and to the best of my professional ability, to a preparation of the case for trial.

Since starting this letter I have received a communication from Mr. Stuart, bearing date July 7th, a copy of which I enclose. You will note he inquires whether I "have anything in mind as to a possible disposition of the case . . ." I cannot truthfully advise him that I have nothing in mind, but can with entire propriety advise him, if you wish me to do so, that you have no settlement to propose. I might add that if Clinchfield has any such proposal you will be glad to consider it.

I hope you will keep in mind in this connection the importance of our not going on record as being unwilling to consider any proposal which the defendants may care to submit. I think this would have a bad psychological effect at a trial.

10. I have never said that "no court will require a million-dollar investment torn down to save a $100,000" investment. I did say that no court of equity is *likely* to require such action *if there is any other practical way of dealing with the questions involved.* It may be that a royalty on each ton of coal which Clinchfield passes through its tipple might be considered an equitable adjustment. As to this I express no opinion.

I understand your broad plan to bring into your activities as large an acreage as possible, but I am sure you have in mind that your ability to have this aspect of the matter considered in the pending litigation is dependent upon your being able to establish a public dock. This, I am sure, you now realize you cannot do upon *Clinchfield's* property but are hopeful of doing upon the C & O's right of way, and if the case ever progresses to that point I shall certainly make every possible effort to safeguard your interests through some practical arrangement with the Railway Company.

Under the provisions of Rule 12(a) of the Federal Rules of Civil Procedure the defendants are required to answer the complaint in the light of our more specific statement within ten days after its service. This statement was mailed to the Clerk for filing with copies to counsel for the defendants on July 1st, and the defendants' responsive pleadings must therefore be filed on July 11th. You will have noted from copy of Mr. Stuart's letter which I am enclosing that he proposes to "discuss with counsel the question whether the material filed meets the requirements of the Court's Order." If they conclude that it does they must, as I have stated, file the responsive pleadings of defendants on or before July 11th. If they conclude that the statement filed does not meet the requirements of the Court's order, they may make a further motion, requiring us to file an additional statement. While this would involve some further delay it would in the long run, I believe, be fruitful to us and likewise helpful to your interests in that it would afford us another opportunity to argue the

*fundamental questions of law* relating to mining rights of a grantee under a mineral deed such as yours.

I talked with Mr. Hynes, counsel for the C. & O., on the telephone yesterday and inquired whether he would voluntarily provide us with copy of the construction contract between the Railway Company and Clinchfield. He stated that so far as he knew there was no contract other than the deed granting the right of way easement, but that he would have the matter investigated at once, and if there was such a contract he would be glad to make it available to us. If he should later advise that there was no such agreement, I will embody a formal inquiry to that effect in our questionnaire and call for its production. Any answer to this document would have to be under oath. I am sure if one exists it will be produced, or a statement on oath made that no such contract was ever executed.

I shall await your further advices, and beg to remain

Sincerely yours,

THOMAS B. GAY

12-10
Enclosures

NOTE: No questionnaires, depositions, or appeals were used by Mr. Gay. Nor was there evidence advanced that "Stripping" was known in Virginia in 1941.

ROY L. MULLINS, M.D.
305 Harrison Street
Frenchtown, New Jersey
Telephone 33

July 11, 1953.

THOMAS B. GAY, ESQ.
Hunton, Williams, Anderson, Gay & Moore.
Electric Building
Richmond, Virginia.

Dear Mr. Gay:

By all means, for phychological reasons as well as sound business judgment, when telling Mr. Stuart that I have no settlement proposal to offer, add "that if Clinchfield has any such proposal I will be glad to consider it." But please do not let the progress of the case be impeded but rather act as pressure upon Clinchfield. I do not mean to allow Mr. Stuart the opportunity of unreasonably holding up the case again as he did by his inquiry as to whether I would be agreeable to send the two engineers to the site.

Mr. Stuart, by that inquiry regarding the joint engineer's plan and my acceptance of it, manœvered me into a very bad position, which is still reflected in his letter of July 7th. I mean to be very careful from here on in as Mr. Stuart has a reputation of being equal to six attorneys, plus the fact that he has at his disposal a corps of attorneys to assist him. Every move he makes will have been very well thought out by the time it reaches me. It was only your forcing the codicile from Mr. Evans plus relieving me of having to go on record of accepting or rejecting the engineer's report which saves me from being placed in a very bad position. I think you should make a decided issue and correction of Mr. Stuart's wording in his letter of July 7, that "in view of Mrs. Mullins' refusal to adopt the methods of operation recommended by the engineers."

when you write to inquire whether Clinchfield has a proposal to suggest.

I wish I could allow you to advance your theory of a mining plan as outlined in your letter to me of July 2nd, if only to test its practibility and soundness from a coal operator's standpoint but which in turn would also test Clinchfield's honesty as to whether any plan which would permit me upon the tract and in their midst would be acceptable to Clinchfield.

It is my most definite opinion that in going on record of accepting the joint proposal, they did so only to discharge an equally bad situation which I had placed them in whereby they could hardly refuse to accept their own engineer's recommendation and were in a position where they must answer first, and which they did fast and firmly, for effect. The Clinchfield Coal Corporation has no intention of submitting to another operation, by their side. Their acceptance was not sincere or truthful, and I know it, as I am sure that you do too, after visiting the site.

When Mr. Stuart, in his answer to the complaint quoted my letter in which I refuse to send my engineer to meet with their engineer because I was sure nothing more would come of it than had come from *those* in the past, he is not telling Judge Barksdale the truth. IMPORTANT in 1948, I sent E. M. Jones an engineer, in 1949 I sent Carol Robinson, M.E. who met Mr. Mathews then Vice-president at the site, in 1950 I arranged for the District Engineer, Mr. Jenkins and Mr. Kindt, Divisional Superintendant to meet with Mr. Mathews and Mr. Hughes, then Chief Engineer of Clinchfield, in 1950 I sent Mr. Codell and Mr. Mc Cormick both engineers to meet Mr. Hughes, and also in 1950 I tried to arrange a meeting with the Cedarrapid's engineer, but Mr. Bahen Assistant to the Vice-president of C & O refused to allow Mr. Jenkins and Mr. Kindt to meet their Mr. Jack Wells and so I telegraphed Mr. Stuart that the meeting was called off. How dare Mr. Stuart make such an implication. I just got tired of sending men and having them go to work on them in some fashion, detrimental to me.

IMPORTANT When Mr. Stuart is trying to imply Laches by saying that the work on the railroad was apparent and tunnels had been made and a cost of a million dollars invested already when I wrote to the Directors of Clinchfield, he again is misleading Judge Barksdale. I had no interest in the 13 miles of spur until it reached my tract. I saw very early in 1946 *June*? their grade work on my tract but I assumed that a common carrier could take what they needed and in many cases the railroad did not allow the construction work to be interrupted while they dickered with a farmer on the price of the r/w but instead traded later or condemned if in the end the farmer did not agree to their price. They broke up fences and turned pigs loose and destroyed gardens and tore up orchards and ect and paid for it later.

Thank you for correcting me with regard to the several points; I am trying to straighten them out in my mind. Also I am glad the Bolling file and the Clinchfield second 1945 letter is located put in the proper file with their letter #1.

I am working on the fifty questions intermittently and we will compare notes later. I seem to have no trouble with subject matter.

Your mining plan continues to give me great concern because being a *very* serious and sincere person, I want with all my heart to be agreeable to all your suggestions, your opinions, follow your advices and in this case allow you to advance your plan.

Therefore I am continuing to study it, in case I should be the one who is wrong about it. Or least until such a time as you would say to me, that upon second thought you realize it would not be feasible or practical. But to-day it remains as a worry over my head that perhaps I am wrong.

My brief is not fully completed on it but just to highlight a few of the troublesome points is the constant interference to the smooth running of my operation, the objection my leasee will undoubtedly have and the probable loss of good leases because of same, the labor relations, the still remaining road building on the slope and the thou-

sand and one other problems to be disposed of such as slag, roads to north coal (permanent), subjacent support and loss of time and economy and many more. But if I feel eventually it has merit, I will want to be the first to admit I was wrong.

In a sense, to offer it or any plan dispels what we have already brought suit for that there *is* no practical and economical plan of operation.

To offer a plan at this time, would only give Mr. Stuart another reason to cause untold delay while the plan was submitted to Clinchfield, to the engineers, visits to the site and God knows how much more red tape before they would accept or reject it and even then would not still be sincere regarding it.

When you write Mr. Stuart don't you think you should make an issue of including C & O into the scope of your inquiry? I feel that C & O is the primary defendant and are hiding behind Clinchfield's skirts (perhaps at Clinchfield's insistence) but never-the-less, I mean to keep C & O ever mindful that originally it was their first acts that commenced this whole affair. Clinchfield should be the Co-Tort Feasor, except that that hardly applies but you know what I mean.

I believe from the tone of Mr. Stuart's letter to you of July 7th, that he realizes you outsmarted him and gave not information or at least not the information he desired and I think he further realizes to ask for another hearing before Judge Barksdale might not be as favorable this next time as it accidentally was previously.

I think you can pat yourself on the back, Mr. Gay, that you scored on that incident. We missed on the sending of the engineers, but after all no one can bat 100% and we were able to wiggle out of the recommendation and now have one up at this point.

But in another sense the engineer's report is fruitful threefold: it allows you opportunity and time to become more familiar with the details of the case; it dispels the impression Mr. Stuart would have liked to have given Judge Barksdale that I would not send my engineer down,

and it satisfies me that I was right when all along I felt Clinchfield was not sincere about any joint operation because they have not the remotest idea of relocating any portion of their permanent improvements. They can't do so. As I told you before, it would ruin them, but then they are ruined anyway.

Very truly yours,

MARJORIE A. MULLINS.

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Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE

FILE No. 11,609

July 17, 1953

*Re: Marjorie A. Mullins* v. *Clinchfield Coal Corporation et al.*

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MRS. ROY L. MULLINS
15 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

I have yours of the 7th and 11th, both of which I have read with interest, and may wish to make a more detailed reply to later on, in the light of what I am about to say in this letter.

On Mr. Stuart's motion, Judge Barksdale entered an order on July 13th extending until September 15, 1953, the time for serving the defendants' responsive motion or other responsive pleading to plaintiff's more definite statement. Under this order counsel may do, as I pointed out in my letter of July 8th, what might be in your interest for them to do, namely, move for a more definite statement of

the plaintiff's claim. If they do I think an opportunity for argument of the more *important legal issues* in the case will be presented, of which I think we can avail ourselves with profit. If they do not proceed in this manner but file a "responsive pleading", which means an answer to the complaint, the case will be at issue, unless we regard the answer insufficient in law or determine to move for a formal judgment on the pleadings. In the meantime there is nothing further we can do except factually to prepare our case for trial.

In the latter connection I enclose copies of three memoranda of law which our associate Mr. Rudd has prepared for me in the last few days, dealing with the following subjects:

1. Do you as the owner of subjacent mineral rights have an absolute right to use any part of the surface, or are your rights limited at the time being to the employment of *particular plans* for the removal of coal from ascertained veins?

2. How should the waiver clause in the deed referring to "damages to the surface or anything thereon" be interpreted?

3. Can you as owner of the minerals estate subdivide your interest and sell, lease or assign it to one or more persons?

I think you will find each of these memoranda of considerable interest.

I have given considerable thought to what reply I should make to Mr. Stuart's letter of July 7th, in which he inquires whether I have "anything in mind as to possible disposition of the case . . . " and have drafted a reply, a copy of which I enclose for your consideration.

I am leaving for Savannah, Georgia, tomorrow night and shall not be back in the office until the morning of Wednesday, July 22nd. I hope you will be able to let me

have a reply to this letter by that time, as I know that Mr. Stuart is planning to get away on a vacation before the first of August, and I think it very much in your interest that a reply to his letter of July 7th be in his hands before he does so.

Sincerely yours,

THOMAS B. GAY

12-10
Enclosures

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Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE

File No. 11,609

July 17, 1953

*Re: Marjorie A. Mullins* v. *Clinchfield Coal Corporation et al.*

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WM. A. STUART, Esq.
Messrs. Penn, Stuart & Phillips
Abindgon, Virginia

Dear Sir—

I refer to your letter of July 7th in which you inquire whether I have "anything in mind as to possible disposition of the case . . ."

Before replying to this inquire, let me say that Mrs. Mullins' "refusal to adopt the methods of operation recommended by the engineers" was made upon my advice, as I think she would clearly have been acting in a manner greatly prejudicial to her interests had she done so.

As to a possible disposition of the case, I have nothing in mind to suggest. I say this for the reason that, after a careful review of the correspondence, maps and other documents passing between the parties, and after spending a day upon the premises, I am of opinion that the only feasible and economic site for Mrs. Mullins' tipple and other structures would be that now occupied by Clinchfield's tipple and structures.

In this view of the matter I have advised Mrs. Mullins that I think we should prepare for trial, and I am acting accordingly.

Very truly yours,

THOMAS B. GAY

12-10
bc—Mrs. Mullins

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Letterhead of

ROY L. MULLINS, M.D.
305 Harrison Street
Frenchtown, New Jersey

Telephone 33

July 20, 1953.

THOMAS B. GAY, Esq.
Hunton, Williams, Anderson, Gay & Moore
Electric Building
Richmond, Virginia.

Dear Mr. Gay:

I made a copy of the agreement between C&O and Clinchfield and I am returning your photostatic copy.

The only thing that impresses itself upon my mind at this time is that no charge was made to Clinchfield for the installation of 12,544 feet of track other than "IN CONSID-

ERATION OF THE PREMISES. . . ." which might be construed to be a violation of the Elkins Act. (Indirect rebate)

I tried to force C&O to give me their terms and conditions in numerous letters and they would not give them to me. Yet in C&O's acceptance of the joint recommendation of the engineers, Mr. Hynes states "It is understood, of course, that it will be necessary for the indicated additional track layout to be covered by our standard trackage agreement, incorporating the same terms offered to other coal operators where the circumstances are similar."

I understood from other coal operators that the usual preceedure that C&O requires is that the operator pay the entire cost of same with the provision that the operator is allowed to redeem a portion of this cost based on the tonnaged shipped during a period of time. The period of time is established in each case by the original size and cost of track installations. It is redeemable at $2.50 per ton on each ton shipped in a five year period or a ten year period depending on size of operation. The amount of $2.50 is also a determined factor. Some railroads refund $3.00 and ect.

I believe it would be interesting to inquire from Mr. Hynes what the standard trackage agreement is that is spoken of in his letter of April 20th, 1953.

We are anxious to learn whether Mr. Stuart filed the answer to our complaint on July 11th or requested an order for a re-hearing. I do hope you can arrange to have Judge Barksdale see the site *before he re-hears the order.*

I was glad to know you had inquired as to the change in the width of the right-of-way, from Mr. Hynes. I believe, when we hear, it will have something to do with the Highway Dept.

Yours of July 17th was received before I had opportunity to close and am therefore able to say that I think the draft of the letter to Mr. Stuart is very good. I notice you omit saying "that we would be glad to consider any proposal they might care to submit." I think upon second consideration is best left unsaid. If they have any proposal in mind, I am sure they would submit it anyway and by

omitting to ask for it we are eliminating any chance of our appearing too eager and secondly, are implying that our primary interest at this time is in the adjudication of my rights. This should tend to make Mr. Stuart very anxious to be allowed to submit a proposal and should one be forthcoming, gives us or (you) a fine opportunity of not exactly rejecting it but pushing it ahead until an adjudication has been completed.

I think your letter to Mr. Stuart is fine and is well thought out. It will certainly give counsel something to think about. If Mr. Stuart has a reputation of being equal to six attorneys, I am being taught that the legal profession may already be well aware of, that Mr. Stuart has met his equal, if not his superior in you Mr. Gay.

I thought you might be interested to know that Mr. Evans and I have been carrying on some informal correspondence originating from my thank you note to him and my check for his expenses and my comments on my Father's illness and the very deep love (almost fanatical love) we both have had for each other.

Apparently Mr. Evans had the same kind of love for his Mother and so he has sent me a book he compiled of stories, sayings and incidents pertaining to the lives of his Mother and Father and which was presented to them on their Golden Wedding Day. His Mother lived six moths short of her 100th birthday.

I am delighted Mr. Evans wanted to share this book with me and I am sure I will enjoy it.

Very truly yours,

Marjorie A. Mullins.

P. S. I read with interest the three briefs but I am ashamed to say that I will have to study them quite a bit before I can comment on them. But at least they are generally favorable to me.

M. A. M.

Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE

File No. 11,609

August 31, 1953

*Re: Marjorie A. Mullins* v. *Clinchfield Coal Corporation et al.*

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MRS. ROY L. MULLINS
15 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

Upon my return to the office today from vacation I find your very kind letter of the 1st enclosing check to our order in the amount of $2500 as a further payment on account of services rendered you in the above matter.

The case of *Hagan Co.* v. *Norton Coal Co.*, 137 Va. 140, referred to in one of the memoranda which I sent you, is the only case decided in Virginia dealing even generally with the question whether it is necessary for you to have a present plan of developing your mineral rights in order to sustain the claim that Clinchfield's improvements, as presently located, cause you legal damage. This case covers some 26 pages of the printed Virginia Reports and is too long for me to attempt to summarize it in a letter, but I believe if you would go to some public law library and ask them to let you see a copy of 137 Virginia Reports they would do so, and you would no doubt read this case with a great deal of interest.

I never had any reply to my letter of July 8th to Mr. Codell, Jr., nor to my letter of the same date to Messrs. Boggess and Coates, although Mr. Boggess some weeks

later called me on the telephone, apologized for not having replied to my letter and stated that your understanding of the litigation with which he was connected was not entirely accurate, but he did say that the *Camilla Red Ash Coal Co.* case reported in 128 Va. 383, to which I referred in one of our memoranda, was considered as controlling in the litigation in which he was involved. This whole question was exhaustively reviewed and dealt with in the later case of *Raven Red Ash Coal Co.* v. *Ball,* 185 Va. 534, also referred to in one of our memoranda.

*While there is nothing definite in either of these decisions upon which we could specifically rely, there is much discussion of the law of mining and mineral rights which will be helpful in a trial of this case.* As I advised you sometime since, the defendants have until September 15th to make any motion or file other pleadings in the case, and until this has been done we cannot very well determine upon what step we should next take in the proceeding. I do think we should proceed to obtain some aerial photographs, and if you approve I will take this matter up in an appropriate way and obtain some estimate of the costs.

Sincerely yours,

THOMAS B. GAY

12-10

**Letter Dated October 15, 1953 From Hunton, Williams, Anderson, Gay & Moore to Mrs. Roy Mullins Concerning Argument at Abingdon, Virginia October 13, 1953.**

Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOORE

File No. 11,609

October 15, 1953

*Re:* Marjorie A. Mullins *v.* Clinchfield Coal Corporation and Chesapeake and Ohio Railway Company

MRS. ROY L. MULLINS
15 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

Mr. Robertson and I flew to the Tri-City Airport in Tennessee last Monday afternoon and, after spending the night in Abingdon, participated in the hearing in the above matter on Tuesday.

The court convened at 9:30 and, with the exception of an hour for luncheon, the hearings continued until about five o'clock in the afternoon. The argument took a wide range and much was said by counsel on both sides which I did not think had any particular bearing on the issues immediately before the court, and which certainly was not supported by any proof or pleading in the form of affidavits then before the court.

To the extent that I participated in this aspect of the matter I was undertaking to reply to or rebut statements of fact or inferences which defendants' counsel sought to draw from our affidavits which I did not believe to be true. I had received your very excellent telegram concerning the C. &

O.'s failure to provide you with a plan for side track facilities, but as this phase of the matter was not developed during the course of the argument, I felt it unnecessary to make use of it.

Judge Barksdale asked me shortly after I began my argument in reply to what had been said by Mr. Stuart and Mr. Greear, whether I though his prior order requiring you to file a more particular statement was in error. I think he was prompted to ask me this by the statement which Mr. Stuart had made, to the effect that your more particular statement had been so prepared as to permit, if not in fact provoke, such an argument. I therefore replied to Judge Barksdale's question by saying that while the more particular statement had not been prepared with any such purpose, I felt justified, in view of Mr. Stuart's statements and of the Court's inquiry, to say quite frankly, but with much deference, that I did think the prior order erroneous. I then proceeded to point out what in my opinion was the legal sufficiency of the claim stated in paragraph 11 of the complaint, and pointed out that an answer by the defendants denying those averments would have put the case at issue and permitted the parties to go to trial. I believe I detected through the argument some indication on Judge Barksdale's part that I had made a favorable impression upon him on this point.

Judge Barksdale asked me whether, if he were of opinion that our more definite statement did not in all respects comply with his order, the entry of a further order requiring you to make that more definite statement more specific would or could be complied with. I replied by saying that in the light of your present engineering advices which were to the effect that the site selected by Clinchfield for its tipple was the best and most economical location for you to employ, you could not prepare or submit plans which would not relate themselves to this particular location and that, as your more particular statement points out, the decision of that question by the Court would necessarily control your future actions. That is, if it be first determined that you

were not entitled to occupy the present Clinchfield location, you would of course have to and in fact desire to submit plans with reference to some other location, but that I did not feel you should, as a matter of law, be required to take such a course in view of the unequivocal opinion of your engineer, which was not controverted at the hearing, that the most feasible and economic location for you to use was that now occupied by Clinchfield—that this was a showing on your part that they had unreasonably pre-empted the use of the surface in derogation of your rights. I did not get any specific reaction from Judge Barksdale on this aspect of the matter.

In concluding my principal argument, I called attention to the averments of paragraph 10 of the complaint that the defendants had stripped and taken away large and valuable coal deposits belonging to you, and called attention to the constant use by Clinchfield, as appears from the Evans affidavit, of the space thus made available for Clinchfield's tramtracks in the transportation of its coal, and argued that this was a continuing trespass upon your property rights.

I relied upon and quoted extensively from the *Clayborn* and *Raven Red Ash Coal Co.* cases in support of this aspect of my argument. I think it made considerable impression upon Judge Barksdale, for the reason that when Mr. Stuart undertook to reply he asked him the direct question why paragraph 10 of the complaint did not state a cause of action. Mr. Stuart undertook to reply to this, as did Mr. Greear, by saying that the coal which had been stripped was only outcrop coal, negligible in amount and of no consequential value, and that the cases to which I referred dealt with the property rights of a surface owner and not those of a mineral owner.

It is difficult for me, if I were otherwise disposed to do so, to make any prediction as to just what Judge Barksdale will do. I am inclined to the view, however, that he will overrule the defendants' motion to dismiss the complaint for failure to state a claim, and also overrule the plaintiff's motion for summary judgment on the pleadings. What he

will do on the defendants' motion to strike our more particular statement as not responsive to his prior order, I am frank to say I do not have any clear idea. I do not believe he will take the drastic action urged upon him by defendants' counsel and hold that, because it is irresponsive, the complaint is therefore insufficient and should be dismissed, and I incline to the view that he will either hold it sufficient, thereby accepting my argument that it should never have been required in the first instance, or require you to file a more definite and complete plan.

At the conclusion of the argument I handed the Court a brief memorandum of law referring to the cases upon which I had relied, and he stated that he would receive a further memorandum from me, or from defendants' counsel, in respect to the matter at any time within the next ten days. I have no present intention of filing such a memorandum as I have cited all the cases I think presently essential. If the defendants file a memorandum relying upon authorities that I do not think pertinent or are distinguishable, I will file a reply.

I do not think we can reasonably expect any action by the Court sooner than thirty days.

Sincerely yours,

12-10 THOMAS B. GAY.

Letterhead of

HUNTON, WILLIAMS, ANDERSON, GAY & MOSES

File No. 12,569

February 25, 1964

*Re: Marjorie A. Mullins v. Clinchfield et al.*
Civil Action 275

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MRS. ROY L. MULLINS
15 Fourth Street
Frenchtown, New Jersey

Dear Mrs. Mullins—

I beg to advise that Mr. Robertson and I went to Roanoke on yesterday and argued our motions to strike certain of the paragraphs of the answers of the defendants. The argument began at ten o'clock and lasted until a little after one, and Judge Barksdale took the matter under advisement, stating that he did not desire the submission of briefs as the position of the parties had been made very plain during the course of the discussion.

I shall not undertake at this time to review what was said, as I have ordered two copies of the stenographic transcript feeling that you should have one so as to carefully to read and understand the defendants' position, particularly that of Clinchfield, on the question of the balance of convenience. This is the principle doctrine that Mr. Robertson and I have explained to you as likely to make the Court indisposed to require Clinchfield to dismantle and remove their improvements, having a value of something in excess of one million dollars, in order to enable you to mine and market coal having a value of say $100,000.00.

[illegible] principal part of his argument [illegible] when you read the transcript you will see a [illegible] number of pertinent cases, including Texas decisions, which recognize and apply the [illegible] doctrine. To state what we have on a matter of [illegible] interest to you would likely be [illegible] unless, as I say, assuming the Court were to find that Plaintiff is appropriated to its use [illegible] at a [illegible] location, the most you would be entitled to recover as damages that would compensate you for the value of your coal.

You will see from my argument that I tried to distinguish the [illegible] doctrine from the instant case [illegible] the [illegible] could not be invoked by a wrongdoer, the Plaintiff, as owner of your mineral rights, [illegible] to [illegible] your coal, and with the knowledge that it had to leave up its improvements [illegible] to remove it as well. Furthermore, that it [illegible] in dealing [illegible] with you and Dr. Bailey [illegible] was pursuing its construction work [illegible] as I [illegible] argue, as it is now [illegible] that I would [illegible] to require it to remove them.

The [illegible] title [illegible] or at least I think I [illegible] [illegible] is not free from sound [illegible] [illegible] *nature of Plainfield's title* [illegible] By this I mean that it has the [illegible] to [illegible] the surface and in a way [illegible] unreasonably interfere with the removal of [illegible] and that is [illegible] in its behalf that in [illegible] specific information from you as to just [illegible] it had a right to select [illegible] desirable location.

In Bailey [illegible] January 19th was at most a general [illegible] [illegible] to mine coal, a fact which [illegible] would require Plaintiff to presume you intended [illegible] do. The specific [illegible] was shown, however, from what [illegible] [illegible] to you. The letter referred [illegible] [illegible] and I am apprehensive

that the Court may take the view that, in the absence of more specific notice as to your intentions, Clinchfield cannot be said to have acted at its peril, but had a right to proceed as it did without fear of being required later to dismantel its improvements.

As soon as the stenographer's transcript is received I will send you a copy and after you have had an opportunity of reading it I should be glad to hear from you further.

Sincerely yours,

THOMAS B. GAY

12-10

NOTE: This is contradictory to August 31, 1953 citing *Hagan v. Norton Coal Co.* case. Also, by letter dated February 21, 1948, C & O was advised exact location of my proposed plant site.

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Letterhead of

ROY L. MULLINS, M.D.
305 Harrison Street
Frenchtown, New Jersey

Telephone 33

April 12, 1954

Dear Mr. Gay:

I am writing you from Jefferson Hospital in Philadelphia, Pa. Room 521 if you have to call me Kingsley 6-1000. I miss my typewriter. I am here for observation only.

When you suggested a complete sell out, it means depriving Dr. Mullins of all his ambitions, all his dreams, his hobby. Literally, all he does is read geological surveys, Gas Journals oil manuels, maps and ect. He has intentions of drilling for gas and oil. But never-the-less, I told Dr. Mullins all that was said by you Mr. Robertson and Mr. Fritzgerald. I was ready with all the same answers that

you had ready for me and he presented to me all the questions that I put to you.

Roy summed it all up by saying that it was a case of whether Judge Barksdale would do his "sublime judicial duty", labeling Clinchfield a "wrong doer" who could not plead the Balance of Convenience and ask Equity. So he ended up by saying that if I wanted to permit you to attempt settlement, that remained with me. But that he did not want *his* tracts used as a better basis of settlement.

Dr. Mullins would like to see Mr. Hynes' map and copy of accompanying letter to you. The one marked yellow, red ect. He would also like to know from the taxation Dept. of State Corporation Commission, what wideth right-of-way C & O is paying tax on.

He would like a copy of Mr. Pasco's Memorandums and Mr. Buford's examination of the right-of-way the C. & O. claims title to and Mr. Rudd's on whether we could acquire a tipple location on the C. & O. right-of-way.

I am interested in Mr. Buford's statement to me that since C. & O. had exspected to receive fee simple title and made commitments to the Highway Dept., The Highway Department could be forced to instigate a proceeding which would require C. & O. to go through with the acquisition of the fee simple property from Clinchfield. I forget the name of this proceeding.

There is also another document obtainable from C. & O. called "Description of Exchange of Property to the Commonwealth of Virginia on Meade Fork Sub-division Wise County, Va." (Property No. 9 is my tract) (Upper Bond) and accompanying maps 18891-84 3/30/49 and revised map 18891-85 4/21/49. Will you obtain two copies of this for me? One for your convenience.

There are two aerial Crossing Permits issued to the Chesapeake & Potomac Telephone Co. 9/7/49 with accompanying cross sections showing r/w wideths at stationing 743 and 748+49 These show the crossing to be over the wide r/w. Will you ask C. & O. for two copies of each (4).

Mr. Gay, I am not ready "to lay down my guns" in this case. There remains too much to be explained which I

know about because years ago I made up my mind to make it my business to know everything, I could so no engineer or attorney would ever be able to fool me again.

I still believe there is a chance of being able to bring my "other coals" for preparation on the fee simple property 460′ x 170′ or 210′ wide area, on C & O Right of way.

C. & O. would not have come forward with the yellow and red map, if I had not dug up permit 30832-S. I knew they had such a map and knew it was filed with the Highway Dept. because Mr. Pettigrew r/w engineer showed me this map in 1950. But I could not make C. & O. or the Highway provide me with a copy. C. & O. in their Answer are very vague about how many lineal feet moved the road. They say "about 300" feet.

About Mr. Fritzgerald, he said if you would send him the solid coal acrages *not* from the Jones Map but from the 1945 letter and Plat accompanying the offer to purchase, he would refigure the tonnages. Then too there is the Blair and Bolling Seams. I am confused by his 100,000 ~~tons~~ figure against Clinchfields 255,000 tons and Jones tonnage of 216,000. [and our 1,000,000 tons.]

But if Clinchfield is a wrong doer, it would seem that tonnage ought not to count, in other words, I have coal and the right to mine it, by deed.

I believe in your honesty to fight in my behalf, I am absolutely satisfied in my mind on that phase of it. I realize the Art of Practicing Good Law is the ability of bringing two diverse minds to see as one. Mine and Clinchfield's. After you fully understand the claim, to try for settlement prior to trial. I agree but two things bother me, no four.

1. Is that I don't believe you have delved deep enough in the Highway Dept. I am not satisfied to sit back and let Com. Anderson acquire the new road location by "adverse position" and the time factor.

2. That I might have, because of fee simple title the right to prepare "other coals" on C. & O. 460′ site.

3. That we have not had enough engineering discissions or studies to realize that there is some Blair coal with 15′ of fill and tracks on top of it. While in close to the toe of the slope, part of the Blair Seam has been removed for trackage area. That coal shell or containing space does not revert until all of the coal has been removed.

4. That in talking to you, you seem to take very lightly the trespass or that normally Clinchfield would have made a *contract* with me for "Wheelage Rights" and so would the railroad Co., for wheeling through my coal seams, 10¢ a ton or (prevailing rate) some pay 25¢ a ton.

I said to Mr. Fritzgerald and he agreed with me that one basis of settlement, and in his opinion the *best*, was a wheelage payment per ton by both companies retroactive and a continuing wheelage payment per ton so long as they wish to stay so located and I would refrain from mining the Upper Bond coal.

*That is, in my opinion, the best and only way to settle this. Could you effect such a settlement now?* I did want Clinchfield to suggest a settlement first.

If Judge Barksdale would do his duty to a wrong doer, there would be nothing to this case.

Sincerely yours,

Marjorie A. Mullins.

/16

FILED
MAY 25 1956
HAROLD B. WILLEY, Clerk

In the

# Supreme Court of the United States

October Term, 1955

No. 918

MARJORIE A. MULLINS,
*Petitioner,*

v.

CLINCHFIELD COAL CORPORATION,
*Respondent.*

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

WM. A. STUART
188 East Main Street
Abingdon, Virginia
*Counsel for Respondent*

A. G. LIVELY
Lebanon, Virginia
*Of Counsel*

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## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

In this brief the Upper Bond tract of land is called "Upper Bond." All italics are ours unless otherwise stated. Page references to petitioner's appendix in the Court of Appeals for the Fourth Circuit have "PA" prefixed, and to respondent's appendix in that Court have "DA" prefixed.

The purposes expressed by petitioner in the paper which she has filed in this Court are two: (1) To obtain the exercise of this Court's power of supervision over the proceedings in the courts below, under Rule 19, 1(b), to the end that said proceedings be vacated *ab initio,* upon the ground of an alleged fraudulent conspiracy against her participated in by respondent's counsel, her various counsel (except her counsel in the Court of Appeals), her expert witnesses, counsel and certain officials of the Chesapeake and Ohio

Railway Company, the District Judge, the deputy clerks of the District Court, the court reporter, the Governor of Virginia and various State officials, the Chairman of the Legal Ethics Committee of the American Bar Association, and others; petitioner's only supporting evidence consists of copies of various correspondence, *filed for the first time in this Court;* (2) To apply for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

We shall herein oppose both these objectives.

## I.

## OPPOSITION TO PETITIONER'S APPLICATION FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION OF THE PROCEEDINGS BELOW.

Respondent here suggests that this Court may deem it proper to strike the petition from its files upon the ground that its gravamen is a tissue of unsupported allegations impeaching the probity of certain members of the bench and bar and other individuals, which are defamatory and scandalous to an extraordinary degree. She charges that they have corruptly participated in a fraudulent conspiracy to deprive her of her property.

We make this suggestion upon the authority of *Green* v. *Elbert,* 137 U. S. 615, and subsequent analogous decisions of this Court. In the *Green* case this Court, speaking through Mr. Chief Justice Fuller, said (at p. 624):

> "We regret that we find ourselves compelled to add something further. The printed argument of plaintiff in error contains many allegations wholly aside from the charges made in his complaint, and bearing reproachfully upon the moral character of individuals, which are clearly impertinent and scandalous, and unfit

to be submitted to the court. It is our duty to keep our records clean and free from scandal.

*"The brief of the plaintiff in error will be stricken from the files and the writ of error dismissed, and it is so ordered."* (Court's emphasis)

In *Yellow Poplar Lumber Co.* v. *Chapman*, 215 U. S. 601, the memorandum opinion states that the writ of certiorari was denied and "parts of the petition and brief of petitioner stricken from the files on account of impertinent and improper matter."

In *Royal Arcanum* v. *Green*, 237 U. S. 531, it was said (at p. 546-7):

> "Before making the order of reversal we regret that we must say something more. The printed argument for the defendant in error is so full of vituperative, unwarranted, and impertinent expressions as to opposing counsel that we feel that we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty. * * * Following the precedent set in Green v. Elbert, 137 U. S. 615, 34 L. ed. 792, 11 Sup. Ct. Rep. 188, which we hope we may not again have occasion to apply, the brief of the defendant in error is ordered to be stricken from the files and the decree below in accordance with the views which we have expressed will be reversed and the cause remanded for further proceedings not inconsistent with this opinion."

In *Cox* v. *Wood*, 247 U. S. 3, this Court found that the brief in question contained "impertinent and scandalous passages," but concluded to permit the brief to remain, in the hope that

"... if, as a result of permitting the [illegible] on the files, they should come under [illegible] they would but serve to indicate to [illegible] of statement an absence of self-restraint or [illegible] ness of decorum will lead, and would [illegible] ish of the duty to be solicitous to obey the [illegible] limitations which an intelligent [illegible] (at p. 6-7).

In *Washington Post Co. v. Chapman*, [illegible] Court returned to the procedure of striking the [illegible] paper from the files. It was said (at p. [illegible]):

> "A writing entitled 'Answer to Petition for Writ of Certiorari and Discussion of Matters of Fact in Brief for Petitioner' signed 'John Armstrong Chapman, Sr.' and filed here April 21, 1939, contains [illegible] vant and scandalous matter and [illegible] It must be stricken from them."

We deem it a fair summary to say that [illegible] opinions in the above cited decisions indicate that the degree to which this Court there ordered stricken from [illegible] approached the degree of far-reaching [illegible] tion and scandal which the present petition contains. In addition to the charges made in the body of the petition, petitioner has made this paper the vehicle of a publication of libelous matter by appending copies of letters written by her to various persons, including the President of the United States and the President of the American Bar Association, communicating the defamations.

It appears to us that the petition is subject to rejection *in toto* by this Court on the above suggested grounds because *the defamatory allegations* constitute the [illegible] upon *which she relies in this Court.* She concedes in the petition that under the rules of conventional procedure she cannot

[illegible] principal claims [illegible] from the District Court's [illegible] findings [illegible] have become [illegible] (Petition, p. 14):

> [illegible] due to having *selecti-* [illegible] *zealous* [illegible] *willing to lay* [illegible] *Transmission Lines* and forced to [illegible] attorneys, working at a [illegible] the major aspect of it [illegible] legal injuries was not [illegible] below, and therefore [illegible] Supreme Court [illegible] this petitioner can ascer- [illegible] and the relief that [illegible] (Petitioner's emphasis)

[illegible] own admission, she cannot [illegible] invoking the exercise [illegible] discretion. Since it is only [illegible] defamatory allegations [illegible] follow that the [illegible] from the title.

[illegible] defamatory charges are [illegible]

[illegible] Bond which is a [illegible] in Wise County, Virginia. [illegible] the validity of the title. Respondent has [illegible] upon the valuable surface improve- [illegible] a mine located upon ad- [illegible]

[illegible] committed a sum ap- [illegible] constructing the improvements [illegible] petitioner wrote respond- [illegible] full value of

Upper Bond, and called upon respondent "to remove therefrom any and all constructions, sidings and machinery and materials within thirty days" (PA XIX). Respondent declined to comply. Thereafter petitioner instituted this action in the District Court of the United States for the Western District of Virginia, seeking a mandatory injunction and large damages against respondent and Chesapeake & Ohio Railway Company, jointly.

The District Court after a lengthy trial found against her on all her main claims, but gave judgment in her favor for $1,363.50 representing the value of a small quantity of outcrop coal which respondent displaced in excavating the foundations of its improvements. Petitioner appealed from this judgment, but *upon the single ground* that the District Court had not applied the proper measure of damages for the displaced coal, contending that instead of awarding her the royalty value (*i.e.* the value *in situ*), the court should have awarded her the value which the displaced coal would have had if it had been prepared for market. Petitioner did not appeal from any of the District Court's adverse findings of fact and of law relative to her claim for a mandatory injunction and her other damage claims. Consequently those findings became the law of the case. The Court of Appeals so determined, saying (petition p. 45-6):

> "On this appeal plaintiff is not pressing for a mandatory injunction, and has raised only the question of the measure of damages applicable to the coal which was displaced by defendant. The Chesapeake & Ohio Railway Company was originally joined as a party defendant in the suit, but the court dismissed the case against it, and plaintiff has not appealed from that ruling."

Petitioner does not charge that the attorneys who prosecuted her appeal from the District Court to the Court of

Appeals (one of whom was her husband's nephew—petition p. 146) were "implicated" in the alleged conspiracy against her. They alone escaped.

Among the findings of the District Court from which petitioner did not appeal are the following (PA XXII-XXIV):

> "8. I find that from and after February 16, 1948, plaintiff at no time had a bona fide present intention to mine the Upper Bond coal. I find that from and after that date her intention and efforts were to force Clinchfield to settle plaintiff's claim at a sum in excess of the value of her interest in Upper Bond.
>
> "9. I find that Clinchfield's improvements, operations and actions have not unreasonably restricted or prevented plaintiff from exercising her property rights on Upper Bond. I find that if and when plaintiff has a bona fide present intention to mine the Upper Bond coal, she is not unreasonably hindered or interfered with by Clinchfield. * * *
>
> "10. I find that mining conditions on Upper Bond are difficult and would render mining the coal relatively expensive; that the amount of the minable coal reserves is at best limited; and that the surface installations which plaintiff would reasonably require in mining would be of a simple and inexpensive type such as is used by truck mines. * * *
>
> "Concluding my findings of fact, I feel constrained to say that this is a remarkable suit. Plaintiff acquired the mineral rights which are the basis of her suit in November 1944 for $3,250.00. Defendant acquired the residue of the title to the tract here in controversy in May 1945 for $2,500.00, a total of $5,750.00. The grantor to both was a native of that vicinity and had offered to sell the entire tract, minerals and all, in 1942 (1944), for $5,000.00. * * * No uranium, gold, oil, or gas, has been discovered on this property, nor even sus-

pected. Yet, on the basis of her $3,250.00 investment, plaintiff has sought in this suit to recover $500,000.00 damages. At as late a date as the filing of her final brief, in the event that the injunction which she seeks should not be awarded her, plaintiff, by counsel, seriously contended that she should be awarded $139,470.75 in compensatory damages, plus $150,000.00 in punitive damages, an aggregate of $289,470.75.

"I am satisfied that no one could have heard the evidence in this case, and I do not believe that anyone can read the transcript of the evidence, without coming to the conclusion that this is *not* (Court's emphasis) the case of a weak and relatively defenseless woman seeking redress for the oppressive and unconscionable actions of a large and soulless corporation. The real situation is quite the converse. It is quite obvious from many, many circumstances disclosed by the evidence that, almost from the beginning, plaintiff has been unremitting in her efforts not to mine her coal, but to extort a fabulous sum of money from the defendant, astronomically greater than the value of any rights which she possessed. * * *

"Being of the opinion that the plaintiff has not acted in good faith, that she has never had any bona fide present intention of mining her Upper Bond coal, and that, even if she did, she would not be entitled to the relief which she has sought, I therefore, upon the facts found, set out the following conclusions of law."

We do not deem it necessary to cite to the Court all the defamatory statements contained in the petition and appendix. However, we think that we should cite a number of them.

Referring to Thos. B. Gay, Esq., and his firm, Messrs. Hunton, Williams, Gay, Moore and Powell, of Richmond, Virginia (well known to this Court), who were counsel for petitioner in the District Court, and to William A. Stuart, of Abingdon, Virginia, of counsel for respondent, who is the writer of this brief, petitioner states:

"This Petitioner has been the unsuspecting victim of a fraudulent attempt *by her own attorneys* to coerce her, through the *intentional* loss of her law suit, into selling to the *Clinchfield Coal Corporation* her valuable surface easements" * * * (Petitioner's emphasis) (petition, p. 3)

"Only after persistent and concentrated strenuous efforts to purchase these valuable rights for a pittance had failed, was her fourth law firm *permitted* to instigate an action, *supposedly* in her behalf. An action, purposely designed and master-minded by counsel for the defendants, looking toward the eventual loss of the case in Court. * * * (Petitioner's emphasis) (petition, p. 4)

"* * * Those attorneys (*i.e.* Mr. Gay and his firm) should be stripped of their right to practice law." (petition, p. 17)

"These dishonorable attorneys (*i.e.* Mr. Gay and his firm) led their client to believe that she was in good hands. * * * By keeping her in the dark and letting her go to court with no engineering data to support her complaints, with no defense planned for her, and deliberately causing her to lose her case, these attorneys could continue their joint plot to coerce her into selling her rights to Clinchfield. (petition, p. 40)

"* * * For a group of unscrupulous attorneys to make a mockery of our judicial system, by conducting a 'mock trial' using a United States Court room as a *tool* to deliberately provoke a miscarriage of justice is a disgrace to this country.

"* * * She feels that this perfectly planned, skillfully executed plot, combining the efforts of counsel *for and against the Plaintiff*, was designed to deliberately cause a Miscarriage of Justice which ultimately would work to Defendant Clinchfield's benefit." (Petitioner's emphasis) (petition, p. 40-41)

"I have discovered all too late that Mr. Thomas B. Gay, Esquire, of the firm of Hunton, Williams, Gay, Moore & Powell of Richmond and the engineers that he selected to assist him were under the direct influence of the Clinchfield Coal Corporation and possibly the Chesapeake and Ohio Railway Company. I am confident that Mr. William A. Stuart, Esquire, *designed* and *engineered* the suit filed in my behalf by Mr. Gay." * * * (Petitioner's emphasis) (petition, p. 109)

"* * * No Judge should allow any Court in these United States to be used as a tool in order to promote private intentions and activities of a group of attorneys, willing to disregard all rules of their profession. The highest profession in the land next to Medicine. William A. Stuart, Judge Lively, Mr. Gay, Mr. Buford and Mr. Robertson and undoubtedly counsel for C. & O. are wholly to blame for making your Court the stage for their illegal and unprofessional endeavors and you (*i.e.* the District Judge) for not putting a stop to it." (petition, p. 113)

"Mr. Stuart, with Mr. Gay's co-operation, tried to trick me into selling and since Mr. Gay urged me after trial to sell, he is guilty of fraud, of trickery and everyone else who participated in any respect, is guilty of the same thing. I expect to openly charge every one of them from the least on up to the very top, before I'm through.

"I am petitioning the Appeal Court to rehear my case, by Dec. 18th. * * * I too, am going to make known to them what Mr. Gay & Mr. Stuart have tried to perpetrate and are guilty of * * *" (petition, p. 116)

"On December 19th, I filed one copy of a petition for a rehearing, in behalf of myself. Upon reflexion and in consideration of the facts disclosed therein regarding Mr. Thomas B. Gay, Esquire, and his effort focused upon *losing my suit* against the Clinchfield Coal Corporation and The Chesapeake & Ohio Railway Company, it appears fruitless to file the twenty-five copies and try to reargue a case purposely misrepresented to

the trial court, by Mr. Gay." (Petitioner's emphasis) (petition, p. 117)

(Letter to the President of the United States) "I am writing to ask you whether you would take a personal interest in an average American Citizen who has for ten years been the victim of law firms who are willing to sacrifice my rights in coal property that I own in Virginia rather than help me to receive justice in court for the acts of two large financially powerful corporations. * * *

"* * * I am utterly powerless to stop them because they have now bought off three law firms prior to trial (*i.e.* J. M. McLemore, Esq., of Wise, Virginia, with whom she had litigation over his fee—Ex. 200, pp. 77, 118—H. C. Bolling, Esq., Norton, Virginia, who recommended to her a compromise settlement and against whom, single-handed, she prosecuted disbarment proceedings to a hearing before the District Committee—Ex. 200, pp. 66, 70, 72-3, 100-1, 129-30, 144; Messrs. Steptoe & Johnson of Clarksburg, West Virginia—T. 188, Ex. 200, p. 12) and one firm and one Judge making a total of four. They buy off my mining engineers.

"The last firm Hunton, Williams, Anderson, Gay & Moore, Richmond, Va. (Mr. Thomas B. Gay, Esquire) * * * Mr. Gay misrepresented the case to the Court and mishandled the facts of the case. * * *

"I will appreciate any assistance in any direction. Mr. Gay should be disbarred. Thank you very much." (petition, pp. 118-19, 121)

"Clinchfield jockeyed for a position it could defend but only with lots of co-operation by my engineers and my attorneys. I say my engineers and my attorneys but that is the understatement of the year.

"But then there will be many people truly embarrassed before my situation, my deplorable situation is resolved and my very valuable rights protected." (petition, p. 140)

"I take decided offense to the tone of your letter to me of March 6th, in answer to mine requesting some special attention be afforded me by the Board of Governors in my effort as a citizen to expose one of the most humiliating and disgraceful and costly, fraudulent attempts to coerce me, by the sacrifice of my law suit, * * * by my own law firm Hunton, Williams, Gay, Moore & Powell, of Richmond, Virginia. * * * Mr. Gay's misrepresentation of my case to the Court and mishandling of my deplorable situation factually was voluntary on his part and that of the other members of this strong firm (supposedly). Believe me, when I say to you, that it was almost worth the sacrifice of my case, to catch red handed not only the members of this firm but other supposedly high class firms and a Judge of a United States District Court on malfeasance, and other officials, in various departments of our Government.

"When the person seeking assistance is told by the Chairman of the Legal Ethics Committee, as I was told to do by Mr. Drinker on March 9th, to 'go home' and to 'forget these rights' and find a hobby or 'plant lilies, or something' and advised (without examining my deed in light of Clinchfield's deed and C. & O.'s violations) *that I had no rights*, I am wondering whether 'This Association is (really) interested in the improvement of law' * * * I read through Mr. Drinker's efforts and realized Mr. Gay's real worry was of Dr. Mullins' nephew bringing my case before the American Bar, because he happens to be one of the few fine Virginia attorneys your letter speaks of. * * * If I had not been a lady and if I had not become so emotionally upset from Mr. Drinker's contemptuous and sneering and decidedly cruel attitude toward me, for having only one desire or to save my property rights, that I would have told Mr. Drinker that I would certainly like to 'plant a lily on a few attorneys I know.'" (Petitioner's emphasis) (petition, pp. 145-6)

"He (*i.e.* Mr. Gay) accepted employment on that

basis, and then a month or so later gave it up. I am satisfied that Mr. Stuart (Clinchfield) and Governor Stanley requested Mr. Gay to withdraw, as all my attorneys are asked to do. But I think right then, Clinchfield and the State of Virginia decided upon another type of strategy, or to conduct a 'mock trial' and 'whip me in Court' in an all out effort to *coerce* me into selling these valuable rights. * * *" (Petitioner's emphasis) (petition, pp. 147-8)

"* * * I had three firms bought off prior to Mr. Gay * * *" (petition, p. 149)

"No. Three is that you advance to the Board of Governors my plea for legal assistance to bring this matter of Hunton, Williams, Gay, Moore & Powell's and Stathers and Cantrall's Clarksburg, West Virginia (this firm's offense was writing her their careful opinion letter of March 10, 1955—petition p. 84—advising against appeal) and now Shewmake, Gary, Goddin and Blackwell's (who wrote her an opinion letter with which she disagreed—petition, p. 128) employment to the Legal Ethics Committee * * *" (petition, p. 150)

Of Judge Barksdale, Judge of the District Court of the United States for the Western District of Virginia, petitioner states:

"This Petitioner advised Judge Barksdale of her counsel's misrepresentation of her case by letters dated April 28, 1955 and December 10 and 11th, 1955, before she reluctantly began to realize that he was implicated and probably was guilty of malfeasance. Judge Barksdale refused to exercise any extraordinary powers and bring her situation to light." * * * (petition, p. 20)

"No Judge should allow his court room to be used as a tool by a group of unscrupulous attorneys in order to accomplish a mis-carriage of Justice. Judge Barksdale

is not fit to be a Judge in any Court much less a Federal Court.

"Is there anyway that I could have this decision set aside and be granted a new trial under honest counsel and an impartial judge? My husband and I are good Americans and we do not deserve this treatment from the legal professions, it is a disgrace to the land. I feel as though I were trying to save my property and get justice in *Russia.* * * *" (Petitioner's emphasis) (petition, p. 121)

"Believe me, when I say to you, that it was almost worth the sacrifice of my case, to catch red handed not only the members of this firm but other supposedly high ciass firms and a Judge of a United States District Court on malfeasance, and other officials, in various departments of our Government." (petition, p. 146)

"No. Two is that Dr. Mullins and I request that the American Bar Association ask for an investigation by the Senate Judiciary Sub-committee into the workings of this case through the United States District Court at Abingdon. The irregularities of the officials of that court for the Fourth Western District, in addition to malfeasance by Judge Alfred D. Barksdale." (petition, p. 150)

"What Judge would write an *absolutely false* set of Findings of Fact?" (Petitioner's emphasis) (petition, p. 152)

Of the court officials, petitioner makes several defamatory statements, one of which is the following:

"I have reason to believe that there are two sets of official documents filed with the Deputy Clerk and that the Court Reporter is under Clinchfield's direction. I have concrete proof of this and also ficticious documents are filed by the railroad with the Interstate Commerce Commission and there may also be two sets filed

there. One true set and one for Mrs. Mullins when I write the Clerk or Department heads." (petition, p. 152)

Of Governor Stanley and other Virginia State officials petitioner makes statements which are offensive and derogatory, if not defamatory (petition, pp. 11, 14, 17, 150).

Petitioner administers a severe verbal castigation to Mr. Drinker, and presents the "sincere request" that he be discharged from his position as Chairman of the Legal Ethics Committee of the American Bar Association (petition, pp. 146-7, 150-1).

It is a striking exposition of petitioner's frame of mind that she makes these extraordinary accusations without a shred of supporting proof. To her, the fact that she lost her case is final proof that the conspiracy must have existed. She offers no other evidence thereof. She is unable or unwilling to understand the legal principles involved. She believes that she has "valuable surface rights of easement" (petition, pp. 4, 6, 8, 18, 28, *et sacpe*) existing independently of any mining which she might do. She does not comprehend that her rights of surface easement exist only for the purpose of the actual mining of her coal, and then only to the extent reasonably necessary for that purpose. She imagines that respondent has no right to prepare on Upper Bond its coal mined on adjoining tracts and that consequently its plant on Upper Bond would be a "starving tipple" (petition, pp. 114, 123). She refuses to accept the fact that her estate consists only of the coal together with the right to remove it while respondent owns the entire residuum.

Having these ideas, she has convinced herself that she holds a great prize in the presence on Upper Bond of the valuable improvements of respondent and of the Chesapeake

& Ohio Railway Company (to which respondent conveyed a right of way across Upper Bond), and that she is entitled to reap a great fortune by way of ransom money.

Consequently, her various counsel who have advised against the litigation, or have recommended compromise, or have recommended against an appeal, become *ipso facto* "implicated" in the conspiracy. In her mind, Mr. Gay, Mr. Cantrall and Mr. Andrews, by their carefully considered opinion letters (petition pp. 69, 74, 84, 94, 128) recommending against appeal and against fresh litigation, thereby provided clear documentary evidence of their guilt. She appends their opinions in the apparent expectation that they will impress the Court similarly.

The same state of mind dictates her reactions to the failure of the District Judge to decide in her favor and of the various officials to act in accordance with her demands.

Petitioner's attitude (with apologies to Gilbert and Sullivan's Lord Chancellor—and to this Court) might well be expressed thus:

> The unsuspecting victim I
> Of Bench and Bar in chancery,
> All deeply villainous men but one,
> And he my husband's sister's son.

Since petitioner's allegations, upon which she bases her application for the exercise of this Court's power of supervision, are unsupported by proof, and are, upon their face, irresponsible and incredible, we do not deem it necessary or even proper to offer formal proof of their falsity. However, since the charges have been placed before the Court, William A. Stuart, the writer of this brief, who has been in touch with the controversy between petitioner and respondent since the beginning, begs leave of the Court to make here, upon his personal knowledge, his categorical denial of the charges.

Petitioner charges that he "purposely designed and masterminded" (petition, p. 4) "this perfectly planned, skillfully executed plot, combining the efforts of counsel for and against the plaintiff" (petition, p. 41). This is wholly untrue. Petitioner's counsel were not "bought off," or any of them. There was no collusion by counsel, and no malfeasance of the District Judge, or any officials.

Turning now to the trial, it was full and fair. As shown by the judgment (PA VI-VIII), the Court viewed the premises, nine days were devoted to the taking of testimony, thereafter written briefs (which were elaborate) were filed, and thereafter the case was argued orally (for an entire day). As hereinbefore noted, after the judgment of the District Court was rendered, and after Mr. Gay had written her his opinion letter of January 19, 1955 (petition, p. 69), advising against appeal, petitioner employed A. M. Cantrall, Esq., of Messrs. Stathers & Cantrall, Clarksburg, West Virginia, to consider the record with a view to prosecuting an appeal in event their consideration should lead them so to recommend. Mr. Cantrall's opinion letter, advising against and declining to prosecute an appeal, includes the following (petition, p. 85-6):

> "Our undertaking here is limited to the giving of this opinion whether it would be advisable to attempt to reopen the case or to appeal. * * *
>
> "At this state of the case you are not in any position to reopen it to take further evidence. If the appellate court should find that some phase of your case had not been fully developed, as, for instance, the matter of damages, it might order a new trial for further evidence on this question alone. This same reasoning applies to any other phase which the appellate court should deem not fully developed. However, much would depend upon the appellate court's views of the matters

of law presented and of your opportunities to present your case fully to the court below. It seems to us that you did have full opportunity to be heard and that you presented all the evidence available to you on the matters involved.

"We have carefully considered this whole matter and regret that we must tell you that in our opinion an appeal would not be justified.

"In reaching this opinion we have carefully weighed many factors which we will not attempt to enumerate in the following summary statement.

"We note initially, as a factor of some weight, the history of this suit. The suit was started on July 25, 1951, and was tried from July 12 to 22, 1954. Several procedures were utilized at length, including depositions and the filing of affidavits and exhibits. All the questions raised in such procedures were briefed and argued. Before the trial the Judge viewed the premises. During the trial each party appears to have had ample opportunity to adduce evidence. The transcript of the evidence at the trial runs to 1264 pages. Some two hundred exhibits were filed during the trial, including many large maps and aerial photographs. Expert witnesses testified for both sides. Following the trial extensive briefs were filed, after which the case was argued to counsel."

Surely it is clear, in the absence of any proof to the contrary, that petitioner had a fair trial and is without grounds for the exercise of this Court's power of supervision.

Because the petitioner appears in these proceedings without counsel, we anticipate that the Court will be inclined to a liberal view of her errors of law and procedure and her failure to comply with the Court's Rules. But surely she cannot thereby be heard upon a paper which makes charges of so irresponsible and scurrilous a character. Simply she cannot excuse the deficiencies of her petition upon the

[redacted] while begging [redacted] petition"), when the [redacted] such that no attorney [redacted] In that aspect, must [redacted] any other litigant?

[redacted] unassailable in her expressions and [redacted] her petition and appendix [redacted] have led her to file here a [redacted] supporting proof, such scan- [redacted] we beg leave to sug- [redacted]

## II.

## [redacted] THE APPLICATION [redacted]

[redacted] should not be of opinion to strike [redacted] the following in [redacted]

### [redacted] Opinions Below

[redacted] the judgment of the [redacted] Fourth Circuit [redacted] *Appellant* v. *Cinch-* [redacted] 2d 88] (Nov. 18, [redacted] the District Court of the [redacted] Western District of Virginia in the [redacted] *Plaintiff* v. *Cinchfield*

*Coal Corporation and Chesapeake & Ohio Railway Company, Defendants,* 128 F. S. 437 (Feb. 24, 1955). The opinion of the District Court is copied in petitioner's appendix in the Court of Appeals (PA p. I ff.). Petitioner did not appeal from the District Court's judgment dismissing the Chesapeake & Ohio Railway Company as a party defendant.

## 2.

## The Petition Does Not Invoke the Jurisdiction of This Court by Any Sufficient Ground Under Rule 19,1(b)

Respondent is dissatisfied with petitioner's statement of the grounds on which the jurisdiction of this Court is invoked (petition, p. 2). Respondent contends that no ground under Rule 19,1(b) is stated in the petition, except the statement (petition, p. 10) that

> "The Trial Court has so far departed from the excepted and usual course of judicial proceedings and the lower Court has so far sanctioned such a departure, as to call for an exercise of this Court's power of supervision."

As we have sought to show in our discussion of this point in the first portion of this brief, there was no departure from the accepted and usual course of judicial proceedings in the District Court.

Aside from the issue of the exercise of this Court's power of supervision, there is here presented a single question for review, as hereinafter set out. That is purely a question of the Virginia law of damages. The petition does not disclose:

> (i) A conflict in decisions of the Courts of Appeal on the question presented, nor

(ii) That the District Court has decided the question in a way in conflict with applicable Virginia law, nor

(iii) That any question of federal law is involved or was decided by the District Court.

*The precise question here presented for review involves a mineral owner's claim for damage against the surface owner who displaced some outcrop coal in grading for the construction of surface improvements.* It is true, as quoted in the petition (p. 21) from the opinion of the Court of Appeals (petition, p. 46), that this precise point has not been previously decided by any court. So far as appears from the reports, no litigant ever advanced such a claim before and petitioner originated the idea. However, this is clearly a question of Virginia law in the present case, and it should follow that there is no ground under Rule 19.1(b) for the intervention of this Court.

Petitioner, in her discussion (petition, pp. 21-2) seeks to apply to a wholly different question the comment of the Court of Appeals that no previous decision existed. She refers the comment to her injunctive claim. But that claim was not before the Court of Appeals, as that court stated in its opinion (petition, pp. 45-6), and the Court's comment quoted by petitioner referred to the totally different question which we mentioned above.

## 3.

## The Questions Presented for Review

Respondent is dissatisfied with petitioner's statement of the questions presented for review (petition, pp. 2-3).

Petitioner states three questions. Respondent contends that the only question which is before this Court is that

which petitioner seeks to state in her question numbered 3. Respondent here re-states it as follows:

> Will this Court accept the finding of the courts below that respondent's acts in excavating sites for its tipple and slack bin and in grading a side-cut for its tram tracks on Upper Bond, whereby some of the outcrop coal mixed with a larger proportion of earth and rock was displaced, did not constitute a willful trespass, when petitioner owned the coal *in situ* and respondent owned the residuum of the title, and respondent had no intention to injure petitioner and believed bona fide that it was acting within its rights, whereby the proper measure of damages for the displaced coal was its royalty value?

Questions numbered 1 and 2, as stated by petitioner, appear to submit a claim for a mandatory injunction requiring respondent to remove its improvements from Upper Bond, or at any rate a claim for damages for petitioner's occupation of a portion of said tract. These questions were not presented to the court below by petitioner's appeal from the judgment of the District Court, and were therefore not considered on the appeal. Petitioner, on the appeal, complained only that the District Court erred in finding that respondent was not a willful trespasser in displacing the outcrop coal in its excavations for its improvements, whereby the Court allowed her only the royalty value of the outcrop coal displaced. Petitioner contended that respondent was a willful trespasser and should therefore have been charged the value which said coal would have had if prepared for market.

Consequently, the Court of Appeals passed upon the single question submitted, and no other. The court said (petition, p. 45:

"On this appeal plaintiff is not pressing for a mandatory injunction, and has raised only the question of the measure of damages applicable to the coal which was displaced by defendant. . . ."

Petitioner, in her brief in the Court below, stated only one question for decision as follows (petitioner's brief in Court of Appeals, p. 4):

"QUESTION PRESENTED

Where there has been a severance of the minerals from the ownership of the surface of land and the surface owner makes extensive excavations for the sole benefit of its adjoining land during the course of which large quantities of coal belonging to the mineral owner are dug up and destroyed, does such removal and destruction of the mineral owner's coal constitute a willful trespass by the surface owner and therefore entitle the mineral owner to damages measured by the market value of the coal at the time of its conversion without deduction for costs of extraction, and not its royalty value as would be the case if the trespass were inadvertent or the result of mistake?"

The question of the measure of damages for the coal displaced was therefore the only question passed upon by the court below, and is thus the only one presented here for review. The questions sought to be raised by petitioner's questions numbered 1 and 2 were resolved against her in the District Court and she did not appeal therefrom. She concedes in the petition that she cannot raise them here (though none the less apparently seeking to do so), saying (petition, p. 14):

"It is regretfully announced that due to having *selected* two unscrupulous law firms *who were willing to lay aside the Canons of Professional Ethics* and

forced to resort to two less experienced attorneys, working at a disadvantage in this action, that the major aspect of it or the Mandatory Injunction for legal injuries was not carried upon Appeal to the Court below, and therefore cannot be reopened on an Appeal to The Supreme Court of The United States, as far as this petitioner can ascertain. So the very essence of her case and the relief that she was seeking is lost . . ." (petitioner's emphasis).

## 4.

## Statement of the Case

### (a)

### Petitioner's Cause of Action

The following facts found by the District Judge were not appealed from in petitioner's appeal to the Court of Appeals.

Upper Bond contains 96.5 acres. On November 22, 1944, petitioner acquired title to the mineral and mining rights thereof for $3,250.00 (PA XVIII-XIX). A few days previously Bond had offered petitioner the entire fee simple estate for $5,000.00 (DA p. 49). Respondent acquired the residuum of the title on May 3, 1945, for $2,500.00 (PA XIX).

Upper Bond is in a disturbed area. Two seams, the Eagle and the Clintwood, outcrop on the hillside, Eagle being unmineable, and Clintwood being so split by thick partings (i.e. strata of dead material) as to make successful mining problematical (PA XIX), so that mining conditions would be difficult and mining operations would be relatively expensive (PA XXI). A lessee of petitioner's predecessor in title surrendered his lease after a brief experience in mining there (PA XXII).

Respondent, in the Summer of 1947, commenced active construction of a coal preparation plant and other valuable improvements on Upper Bond to serve its Meade mine located on an adjoining tract where respondent owns the mineral. Until February 16, 1948, petitioner did not object, but on the contrary initiated a course of correspondence with respondent looking to the lease to respondent of the Upper Bond coal (PA XIX).

Up to February 16, 1948, respondent had spent or committed a sum approaching $2,000,000.00 on constructing its Upper Bond facilities and on opening Meade mine to be served by them. By the said date, the Chesapeake & Ohio Railway Company had completed a line from Jenkins, Kentucky, to respondent's preparation plant on Upper Bond (PA XX).

On February 16, 1948, petitioner broke off the lease negotiations with respondent and demanded that respondent remove from Upper Bond "all its constructions, sidings, machinery and materials within thirty days," saying that she planned to mine the coal herself and that her operations "would require the entire surface of Upper Bond." Respondent declined to comply but offered to cooperate with her in her proposed mining operations (PA XIX-XX).

Petitioner did not accept the offer and did no mining. She instituted suit against respondent and the Chesapeake & Ohio Railway Company jointly, alleging that the presence of the improvements made it impossible for her to mine and praying for a mandatory injunction requiring the relocation or removal of all the improvements and for $500,000.00 damages (petition, p. 45).

(b)

THE DECISION OF THE DISTRICT COURT

After viewing the premises and after a lengthy trial,

the District Court found against petitioner on all points, except that it allowed her damages in the sum of $1,363.50 (PA VI-VII). That sum represented the royalty value of the outcrop coal displaced, consisting of 2682 tons from Eagle and 2772 tons from Clintwood totaling 5454 tons at 25¢ per ton (PA XXI).

With regard to the measure of damages for the displaced coal, petitioner contended that respondent was guilty of willful trespass in displacing this coal and that the proper measure of damages was the value which it would have if prepared for market, while respondent contended that it committed no trespass and that the outcrop coal had no value as coal but was part of the surface, and that respondent was entitled to treat it as "just soil" which was just what it had done (petition, p. 51); respondent further contended that if it was held to have committed a trespass in displacing the coal, the trespass was in any event not willful since it had acted in good faith and in the reasonable belief that it was within its rights, and without design to injure petitioner, and that the proper measure of damages was therefore the royalty value of the displaced coal. The District Court found that there was a trespass but that it was not willful and accordingly awarded petitioner the royalty value of the displaced coal.

The findings from which petitioner did not appeal included the following (PA XXII):

> "13. I find that Clinchfield in displacing the five thousand four hundred fifty-four (5,454) tons, acted in good faith. It believed in good faith that it was within its rights as owner of the surface estate in making the excavations, and further believed in good faith that the coal displaced had no market value. The evidence does not show that this coal had any market value.

"14. I find that Clinchfield did not sell, or otherwise dispose of, the displaced coal, and did not remove it from Upper Bond."

Commenting on this finding, the District Court said (PA XXII-XXIV):

"Concluding my findings of fact, I feel constrained to say that this is a remarkable suit. Plaintiff acquired the mineral rights which are the basis of her suit in November, 1944, for $3,250.00. Defendant acquired the residue of the title to the tract here in controversy in May 1945 for $2,500.00, a total of $5,750.00. The grantor to both was a native of that vicinity and had offered to sell the entire tract, minerals and all, in 1942 (1944) for $5,000.00. Shortly prior to that, he had leased the coal for $25.00 and royalties of, first, fifteen cents and then, twenty cents per ton. After lessee had conducted a small mining operation for less than a year, he surrendered his lease and got back his $25.00. No uranium, gold, oil, or gas, has been discovered on this property, nor even suspected. Yet, on the basis of her $3,250.00 investment, plaintiff has sought in this suit to recover $500,000.00 damages. At as late a date as the filing of her final brief, in the event that the injunction which she seeks should not be awarded her, plaintiff, by counsel, seriously contended that she should be awarded $139,470.75 in compensatory damages, plus $150,000.00 in punitive damages, an aggregate of $289,470.75."

On all of petitioner's claims, except the claim for damages for the displaced coal, the District Court found against her. From those other findings she did not appeal. Respondent did not appeal from the judgment against it for the displaced coal.

The findings of fact from which petitioner did not appeal included also:

> "Petitioner has at no time since February 16, 1948, had a bona fide present intention to mine. Since then her intention and efforts have been to force respondent to settle her claims at a sum in excess of the value of her estate in Upper Bond" (PA XX-XXI).

The Court of Appeals confirmed all the above-stated findings of fact of the District Court ("We adopt these findings"—petition, p. 45—"These findings are supported by substantial evidence and should not be disturbed"— petition, p. 45—"We agree with this finding"—petition, p. 50).

(c)

THE FACTS RELATIVE TO THE DISPLACEMENT OF THE COAL

(i)

*The Manner in Which the Material Was Displaced Was in the Course of the Usual and Ordinary Type of Excavation for the Construction of Surface Improvements.*

All of the testimony as to the manner in which the material was displaced, and as to respondent's motives and intentions in doing so was uncontradicted. In making the sidecut for the tram track grade, respondent followed the usual and standard construction procedure. It employed a bulldozer exclusively and displaced earth, stone and outcrop coal together. There was no separate removal of the carbonaceous material.

> "It was the usual type of construction work done in making your level area along the side of the hill with your bulldozer. The bulldozer blade is set on an angle with the blade faced into the hill and plowing the dirt from the face of the hill and shoving it over the side and making a horizontal bench." (DA 24-5)

> "It was standard construction and leveling the surface such as making roadways and highways or railroads, standard construction procedure." (DA 39)

Respondent made no special disposition of this outcrop coal. All of it that was displaced still remains in the general mixture of earth, stone and carbonaceous material that was displaced —

> "The Company took none of the coal * * * didn't take it elsewhere and dispose of it * * * pushed it over the side of the slope with a bulldozer." (DA 24)
>
> "It (the outcrop coal) was handled as all the other dirt and rock material were handled." (DA 36)

The District Court below said:

> "It would be another matter if they had salvaged it and sold it, but obviously they treated it as soil because all they did was push it over the bank and *use it as the soil which was pushed over also.*" (PA II)

Respondent displaced the material on the adjoining land where it owned the coal in exactly the same manner as on the land where petitioner owned it (DA 41).

The tram tracks were already in place when respondent constructed the slack bin and ditch, so that the displaced material in that instance could not be pushed by bulldozer across the tram track level and over the bank. This material "was loaded along with the overburden and dirt . . . and hauled down into the tipple bottom and dumped" (DA 37). All the material displaced in leveling the tipple site was treated just as in the case of the tram track grade—"it was pushed over the bank and became a fill" (transcript, 1116).

(ii)

*Essentially, the Displaced Carbonaceous Material Was Merely Soil*

It is unquestionable that in every instance respondent treated all the displaced material simply as "soil" (PA II), and essentially, soil is all it was.

Hughes, respondent's president, stated:

> "It was definitely outcrop coal. It actually was not what I would call coal, it was black, compact material, and perhaps had a small amount of fuel value, but it definitely was not salable." (DA 40)

Tieche stated:

> "In all of our opinions, in constructing that bin and the tramroad, that material was just outcrop coal. Starting from the outside of the crop line it was just stained dirt, and as you progress in, it gradually became firmer, although we are sure none of that coal could have been shipped to any of our customers and we made no attempt to save it. * * * That coal is not marketable in the trade." (DA 34)

Outcrop coal is worthless. It is regarded in the coal mining industry as "just soil" (DA 22).

Hughes said:

> "* * * usually the first underground mining of coal is thrown away. We do not want it * * * because it is soft and stained and low in heat value * * * Our customers would not accept it and we would not want our name applied to that kind of product. It would ruin our reputation." (DA 41)

He said that in opening a new mine, they had to mine

through outcrop coal for 70 to 80 feet before reaching coal of commercial value (DA 40-1).

(iii)

*Respondent, in Displacing the Material, Acted Without Malice, Did Not Intend to Injure Petitioner, and Believed in Good Faith That It Was Acting Within Its Legal Rights.*

With regard to respondent's motives and intentions in grading the sites for its surface improvements on Upper Bond, respondent's good faith is established without contradiction in the record. It had no purpose to deprive petitioner of any of her property or rights or to injure her in any way.

It believed in good faith that in grading the sites for its surface improvements, it was exercising rights which belonged to it as the owner of the surface. The court so found as a fact:

> "* * * I think that the defendant acted in good faith in its assumption that the coal it removed had no value. As I say, I am very doubtful whether it did have commercial value, but at any rate, I am satisfied that the defendant was not guilty of any bad faith or wilful misconduct in destroying that coal. It would be another matter if they had salvaged it and sold it, but obviously they treated it as soil because all they did was push it over the bank and use it as the soil which was pushed over also." (PA II)
>
> "I find that Clinchfield in displacing the five thousand four hundred fifty-four (5,454) tons, acted in good faith. It believed in good faith that it was within its rights as owner of the surface estate in making the excavations, and further believed in good faith that the coal displaced had no market value. The evidence does

not show that this coal had any market value [illegible] App. XXII, finding No. 13).

Respondent's belief was reasonable. It is a matter of common knowledge that people live in coal bearing areas and carry on there the usual activities of living. Residences are erected, highways and railways are created and constructed. Doubtless the members of this Court in traveling through coal bearing areas have often seen outcropping coal seams in the banks of highway and railway cuts. The coal mining area of Southwest Virginia is a land of high rugged hills and deep narrow valleys. There is no way to construct buildings, highways, railroads, and other improvements requiring a level footing except to excavate coal. These activities cannot be carried on without disturbing the outcrop coal at the points on the hillsides where coal seams outcrop. That it is generally believed that such disturbance does not infringe the rights of mineral owners is strongly attested by the fact that [illegible] there is no recorded case of such a claim as the one here [illegible] —certainly not in Virginia.

It is against this background of common usage that the good faith of respondent's action is to be judged.

That respondent bona fide believed that it had the right to displace the material in question is convincingly shown by the testimony. Respondent believed in good faith that the superficial material *belonged to it, as the owner of the surface property subject only to petitioner's ownership of the coal.* Displacement of coal near the surface in construction of surface improvements happens "many times in coal bearing areas * * * in the construction of a house * * * in the excavation of a building * * * in digging wells * * * in a proper use of their surface rights." [illegible]

[illegible] intention to trespass upon [illegible] displacing that material [illegible]

[illegible] surface in establishing [illegible] (DA-39). "We felt that in [illegible] surface [illegible] we wanted to erect a [illegible] required that the foundations [illegible] material which would [illegible] within our rights to go [illegible] the foundations." (DA [illegible] foregoing to remove or displace [illegible] (DA-40).

[illegible] good faith of respondent's [illegible] involved was [illegible] mentioned that [illegible] across the interest [illegible] used the owner of [illegible] material exactly as it treated it [illegible]

[illegible] *Displaced Carbonaceous Material by Mining It*

[illegible] displacing the carbonaceous material [illegible] which incurred to it any [illegible] necessarily could not be considered [illegible] carbonaceous material [illegible] and the court [illegible]

[illegible] whether that coal had any real [illegible] and it did belong to the

> plaintiff. * * * At the same time I think that the defendant acted in good faith in its assumption that the coal it removed had no value. As I say, I am very doubtful whether it did have commercial value. * * *" PA II)

*that value, instead of being added to by the actions of the respondent, was wholly dissipated thereby.* The court found, with reference to the value of this so-called coal *after its displacement*:

> "The evidence does not show that this coal had any market value." (PA XXII, finding No. 13)

The conclusion is inescapable that, as to all the displaced material, respondent's actions imparted no additional value to the carbonaceous component, but rather the contrary. It is obvious that a mixture of earth and rock with a small proportion of low class carbonaceous material would not be salable as coal.

## 5.

## The Argument

Petitioner challenges the District Court's finding of fact that respondent believed in good faith that it was within its rights in making the excavations. She challenges the District Court's conclusion of law (PA XXIV) that respondent was not guilty of willful trespass so that the proper measure of damages was the royalty value of the coal.

### (a)

### Respondent's Trespass Was Not Willful

Without arguing the facts under this heading, which

we believe are sufficiently set out in the statement of the facts hereinbefore contained, we submit that the District Court's finding that respondent acted in good faith is adequately supported by the evidence.

The applicable decisions of the Supreme Court of Appeals of Virginia appear to us to settle the question of law in respondent's favor. We refer the Court to the following authorities:

The leading Virginia case is *Wood* v. *Weaver*, 121 Va. 250, 92 S. E. 1001. The plaintiffs had sued defendant in conversion for cutting and removing certain trees which defendant claimed it owned but which were in fact owned by plaintiffs. The jury had rendered a verdict for plaintiffs for the market value of the trees *after their manufacture into lumber*. The trial court placed plaintiffs on terms to accept the stumpage value of the trees. The Virginia court affirmed, holding that the jury had proceeded under an erroneous instruction that they should award plaintiffs the market value of the manufactured lumber (thus including the value added to the trees by defendant's labor) *even though defendant had cut and removed the trees in the bona fide belief that they were his property*. The Court said (121 Va. 255-6):

> "But there was other evidence aforesaid from which *the jury might have found the fact to be that he did the cutting under such claim of title and that the latter was bona fide; * * *"*
>
> "In view of said quoted instruction, this did not mean a finding by the jury that the trespass of the defendant in the cutting of the trees was a willful trespass, but the contrary, since the trial court instructed them, in effect, to find that very verdict if they believed from the evidence that the trespass was not willful, but under *bona fide* claim of title."

The Court went on to discuss the nature of a non-willful trespass (121 Va. at 261-3):

> "Mere negligence of the trespasser with respect to ascertaining the true location of property, or the title to it, will not render the trespass willful (*Powers* v. *U. S.*, 119 Fed. 562, 56 C. C. A. 128; *U. S.* v. *Eccles* (C. C.), 111 Fed. 490; *Beede* v. *Lamprey*, 64 N. H. 510, 15 Atl. 133, 10 Am. St. Rep. 426; *Durant Min. Co.* v. *Percy etc., Co. supra*). There is some conflict in the authorities however. See *Donoven* v. *Consol. Coal Co.*, 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206; *Mississippi, Etc., Co.* v. *Page, supra,* and the Texas case of *Young* v. *Pine Ridge Lumber Co.* (Tex. Civ. App.), 100 S. W. 784, and other Texas cases. This last named case goes beyond the true rule, to the extreme of holding that if the trespasser, by the exercise of reasonable care and diligence, would have known that he had no title to the timber cut he was a willful trespasser; which, in effect, holds that if he was guilty of negligence the trespass was willful. To the same effect *Messer* v. *Walton*, 42 Tex. Civ. App. 488, 92 S. W. 1037; *Ripy* v. *Less*, 55 Tex. Civ. App. 492, 118 S. W. 1084. The great weight of authority, however, is as stated * * *"
>
> "The trespass must be committed under a *bona fide* claim of right, or title, not induced by gross negligence in failure of the trespasser to ascertain the correct location of the property, or the title to it, otherwise it is willful; and, conversely, if it be in truth committed under such claim of right or title, not induced as aforesaid, it is not willful (citing numerous authorities). *This rule is not changed by the fact that the trespasser has notice at the time of the trespass that another asserts a bona fide title to the same property* * * *"
>
> "Therefore, under the well settled rule shown by the above cited authorities, the plaintiffs were entitled to recover only compensatory damages, unaugmented by

the added value due to the labor of the defendant in manufacturing the trees into lumber—that is to say, in such case the stumpage value of the trees, or $276.00 was the correct measure of the plaintiff's damages."

*French* v. *Stange Mining Co.*, 133 Va. 602, 114 S. E. 121, involved a controversy over the ownership of a tract of land containing manganese ore. Complainant instituted a suit for discovery and accounting, alleging that defendant had removed some of the ore and praying for discovery of the amounts received by defendant in marketing such ore. The Virginia court held that the market price received was not material, saying:

"* * * The complainants are not entitled, under the averments in the bill, to recover the purchase price of the ore as a finished product. This would be the measure of damages if the defendants had been willful trespassers, but they cannot be so regarded. The measure of damage in this case is the value of the ore in place, or what may be termed its royalty value * * *." (133 Va. at 618)

"* * * the willfulness of the defendants' conduct is negatived by the allegations of the bill. Johnson and those claiming under him were in good faith asserting title to the whole of the 177 acres, and actually prevailed in that claim as to about one-half of the land." (133 Va. at 619)

In *Pan Coal Co.* v. *Garland Pocahontas Coal Co.* (W. Va.), 125 S. E. 226, the defendant had mined, prepared and sold some of plaintiff's coal. The defense was that defendant had a reasonable and honest belief under an agreement with plaintiff's mine superintendent that he had the right to mine the coal. The court declined to instruct the jury that if defendant mined the coal in good faith, in the honest

belief that he had the right to do so, the plaintiff was entitled to recover only the value of the coal in place. On the contrary the court instructed the jury that the measure of damages was the market value of the coal after its preparation for market by the defendant. The West Virginia Court of Appeals reversed the case, saying (125 S. E. at 232):

> "Can we say, as a matter of law, that the defendant was a willful trespasser as to section No. 1? If he was, then the refusal of defendant's instruction was not error. If we cannot, then it became a question for the jury, and should have been submitted to it. That defendant intentionally mined out the section, knowing it was plaintiff's coal, there can be no doubt. *In the sense that it did it intentionally, its trespass was willful. But so is every trespass under a bona fide claim of right. However, in the law of trespass, the terms intentional and willful are not always synonymous.*" * * *
>
> "* * * In this sense, to be a willful trespasser, one must not only intentionally commit the act of trespass, *but must do so under such circumstances as would warrant the court or jury in finding that he did it in bad faith.* * * *" (125 S. E. at 232)

Is it not clear that the District Court correctly applied the appicable rule of law to the facts of this case, and that the Court of Appeals correctly affirmed?

## III.

## CONCLUSION

We submit that the petition should be refused.

Respectfully submitted,

A. G. Lively
Lebanon, Virginia
*Of Counsel*

Wm. A. Stuart
188 East Main Street
Abingdon, Virginia
*Counsel for Respondent*